

Unlocking the Mysteries of the Bermuda Triangle

By Donald Walsh and Ken Gauvey

No employer can deny the simple statement that “accidents happen.” After getting over the initial shock that every employer feels when an employee is injured on the job, the employer is left with a myriad of questions about their responsibilities. How did this happen? Is the employee getting the appropriate care? Can I get someone else to fill the position while the employee is out? What do I have to provide the employee while they are out? When can the employee come back to work? Can I change the job for the employee to accommodate their injuries until they are 100%?

The answers to these questions cause an interplay into what employment attorneys like to refer to as the “Bermuda Triangle” of employment laws where navigating employment decisions becomes confused by compliance with workers’ compensation laws, the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). Depending on the situation, employers need to understand their responsibilities related to medical and disability leave and the overlap of these laws.

While completely distinct, these laws have significant crossover. For example, both the FMLA and ADA deal with disabilities, but the FMLA applies to employers with 50 or more employees while the ADA applies to employers with 15 or more employees. The FMLA deals with temporary or chronic serious health conditions. The ADA deals with permanent disabilities or perceived disabilities. The FMLA provides for 12-weeks of unpaid leave during any 12-month period. The ADA mandates reasonable accommodations to accommodate the needs of employees with disabilities. These reasonable accommodations are dependent on individual circumstances and are required unless providing such accommodations would present the

employer with an undue hardship. Both the FMLA and the ADA have strict mandates on notice and communications required for employees to take advantage of these laws and for employers to ensure the integrity of their FMLA and ADA policies and procedures.

In dealing with these federal mandates on disabilities, employers also have to take into account the State’s Workers’ Compensation Acts. Although state by state limitations exist, the Workers’ Compensation Acts in each state and the District of Columbia generally apply to all employers. The statutes require employers to compensate an employee for personal injury or death by accident arising out of and in the course of employment.

These three acts overlap primarily from the definition of the illness, injury, or disability concerned in each statute. Thus, it is possible for one statute to apply and not the other.

A temporary condition can constitute a serious health condition under the FMLA, but it generally will

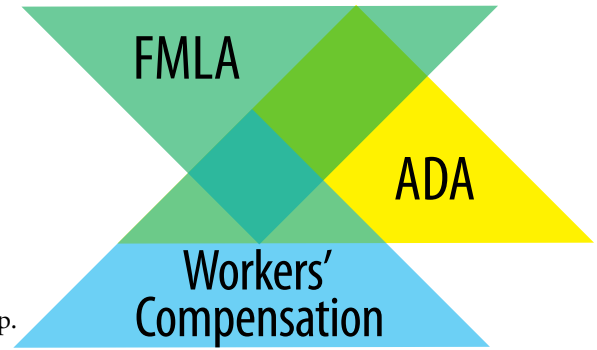
Donald J. Walsh is a partner and Ken Gauvey is an associate in the law firm of Offit Kurman, PA which is a full service firm with offices in Baltimore County, Howard County, Montgomery County and Philadelphia. Mr. Walsh and Mr. Gauvey counsel clients and lecture on issues related to employment law. If you have questions regarding the substance of this article or other employment issues Mr. Walsh may be reached at 443-738-1583 or dwalsh@offitkurman.com and Mr. Gauvey can be reached at 443-738-1559 or kgauvey@offitkurman.com.



Donald Walsh



Ken Gauvey



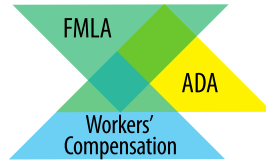
not be a disability under the ADA. An employee may have a long-term disability without hospital care or continuing treatment. Without such treatment, the employee is not eligible for protection under the FMLA but may be entitled to ADA protection. Work-related injuries entitling an employee to workers’ compensation may result in a disability or serious health condition. In such situations, an employer may have to consider making reasonable accommodations for any disability under the ADA or allowing the employee leave time for any serious health condition under the FMLA. FMLA and workers’ compensation also overlap in that a workers’ compensation absence can run concurrently with FMLA leave time, as long as the employer properly designates the time as such and notifies the employee. These are just some of the examples of the difficulties in navigating this complex area of law.

Moreover, there are ongoing concerns in each area of law that involve constant supervision. As most employers know, during the FMLA leave, employers must continue employee health insurance benefits and, upon completion of the leave, restore employees to the same or equivalent positions. Unlike the ADA, the FMLA also allows an employee who takes intermittent or reduced scheduled leave to be temporarily transferred to an alternative position. Most employers create light-duty work to allow or encourage an employee receiving workers’ compensation to return to work. During the 12-week period of FMLA leave, an employee is permitted, but not required, to accept an offer of light duty. Thus, any refusal of light duty cannot detrimentally affect the employee. If the employee returning from the workers’

Continued on page 11

Unlocking the Mysteries of the Bermuda Triangle

continued



compensation injury is a qualified individual with a disability, he or she will have rights under the ADA. Although the ADA does not require an employer to create light duty work if it does not exist, in some cases a less demanding job may be considered a reasonable accommodation.

Medical examinations and inquiries pose a gray area. Under the ADA, all medical inquiries about an employee must be job-related and consistent with business necessity. Permissible questions include whether an applicant can perform the essential functions of the job, with or without a reasonable accommodation. The FMLA, the ADA, and the worker's compensation statutes each have a provision that prohibits employers from retaliating against employees who have taken advantage of the protection and benefits of these statutes. To prevent retaliation claims, employers should have published policies provided to employees and ensure that any employment action is based on issues unrelated to or protected by the ADA, the FMLA or workers' compensation.

There are a few basic steps employers can follow to determine their responsibilities regarding medical and disability-related leave requests. First, the employer must determine which laws cover the particular employee's situation. For example, a short-term or temporary condition does not usually meet the ADA's definition of disability but may qualify under FMLA.

Use this quick checklist:

- 1) Do you have established, published policies clearly indicating the steps employees and managers must take regarding Workers' Compensation, FMLA and ADA?
- 2) Is the injury work related? (workers' compensation)
- 3) Does the employee have a serious health condition? (FMLA)
 - a. Has the employee provided medical certification?
 - b. Has the employee been notified of the FMLA leave?
 - c. Have steps been taken to preserve the employee's position and/or status for the remaining period of available FMLA leave?
- 4) Does the employee's condition meet the definition of disability (does it impact a major life activity and prevent the employee from performing the essential functions of his or her job)? (ADA)
 - a. Can the employee perform the job with reasonable accommodations?
- 5) Can the employee perform light duty?
 - a. Is this encouraged/discouraged by the workers' compensation carrier?
 - b. Can the employee safely perform the duties assigned?
 - c. Will the employee's performance of these duties endanger the safety of other employees?

IWIF earns **91** percent overall satisfaction rating from our policyholders. Key service departments also score high ratings.

IWIF's overall customer service satisfaction rating among surveyed policyholders **reached an all-time high of 91 percent** in 2010. IWIF measures customer satisfaction among 400 randomly selected policyholders who had at least one claim and whose premium ranged from \$2,500 to \$25,000 and above. IWIF uses an independent market research firm to conduct the surveys. In addition to our high overall rating, these key IWIF service departments also scored high with policyholders:

91%
Overall Satisfaction

IWIF Call Center 91%

IWIF Loss Control 92%

IWIF Claims Services 94%

Thank you!

The annual satisfaction survey results enable IWIF to develop strategies that better meet and exceed our customers' needs, expectations and improve our customers' IWIF experience.

IWIF serves up savings with Maryland Restaurant Owners Program

Did you know there are more than 5,000 restaurants in Maryland? IWIF has added a new workers' comp discount program for eligible restaurant owners. Contact your local agent or visit IWIF.com for additional information.



New IWIF.com website coming soon!

Launching this spring will be a redesigned IWIF website that features a new look, more tools and streamlined navigation to make finding information and transacting business with IWIF easier. A section devoted to helpful workplace safety tools and information will be the new IWIF Safety University.

