

The intersection of ADAAA, FMLA
& workers' compensation

out

FRONT

I D E A S

with kimberly and mark

Q&A





INTRODUCTION

On September 20, 2016, Out Front Ideas with Kimberly and Mark presented a webinar on the Intersection of ADAAA, FMLA & Workers' Compensation. Guest panelists included:

- Bryon Bass, Sr. Vice President, Disability and Absence Practice and Compliance, Sedgwick Claims Management Services, Inc.
- Jeff Nowak, Co-Chair, Labor and Employment Practice Group, Franczek Radelet
- Adrienne Paler, Director, Total Health & Productivity Management, Integrated Disability and Absence Management, Sutter Health

[View the archived webinar](#)

The intersection of workers' compensation, leave of absence and the ADAAA requires a thoughtful approach to absence and return to work. In the past, employers offered "light duty" or "transitional work programs" for workers' compensation claims, however, this was inconsistently applied to employees on disability or leave of absence. Current ADAAA regulations require employers to consider a consistent return-to-work program across various absence programs and accommodation requests. Regardless of an approved or denied workers' compensation claim or leave of absence, ADAAA regulations apply.

In the webinar, the panelists explained that the interactive process applies to workers' compensation claims, which surprised many participants. The questions and answers in this document add color to the conversation between guests and provide insight to what is on the mind of employers and payers addressing this challenging topic.

Please keep in mind that these are complex legal issues and this document should not be interpreted as legal advice. Please consult with an attorney as needed.

Thank you, again, for supporting Out Front Ideas with Kimberly and Mark and we hope you will join us for future events.

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LEAVE PROGRAM DETAILS

When an employee returns to work in a limited-duty capacity, does the time in limited duty count as part of their FMLA leave?

The FMLA calendar counts when an employee is off work, not working in an accommodation.

Can FMLA and workers' compensation leave run concurrently in all states?

Yes, however, some state FMLA-like leaves may not run concurrently.

Can FMLA run out while an employee is also receiving time-loss benefits from a workers' compensation claim?

Yes. An approved workers' compensation claim or short-term disability claim may be approved after FMLA runs out. FMLA typically runs concurrent with any medical absence, including workers' compensation.

Are siblings covered under FMLA / CFRA?

For the most part, barring a few exceptions such as guardianship, siblings are not covered under FMLA. FMLA limits family members to spouse, children and parents. Unions may negotiate a broader definition of "family member" to include grandparents, grandchildren, siblings, parents-in-law and domestic partners.

The California Family Rights Act, barring legal definition of guardian, does not include siblings. CFRA was established to ensure secure leave rights for the following:

- Birth of a child for purposes of bonding.
- Placement of a child in the employee's family for adoption or foster care.
- For the serious health condition of the employee's child, parent or spouse.
- For the employee's own serious health condition.


HEALTHCARE PROVIDER INVOLVEMENT

How does the healthcare provider gather information on the employee's potential disability and possible recommended accommodations?

Physicians are often asked to complete an accommodations form to address an employee's functional capabilities as part of ADA, which is also used for disability, leave of absence and workers' compensation return-to-work purposes, as applicable.

If involving the healthcare provider relating to restrictions, do you need to get the employee's permission first?

When engaging a healthcare provider, a release will be necessary. This is true for workers' compensation, disability and leave of absence.



What should an employer do when the physician continually projects an ability to return to employment within 60 or 90 days, the projection is not accurate, but the physician continues to provide the same estimated return to employment to a point where it becomes unreliable?

You should establish a timeframe upon which a leave can no longer be accommodated. This will require a hardship analysis.

EMPLOYER OBLIGATIONS

If an employee has been injured due to an employment-related injury, does the FMLA law require the employer to offer group insurance during the 12-week/16-week disability period?

During the FMLA-protected period, the FMLA requires employers to provide health and welfare benefits consistent with the benefits that the employer offers those who are actively employed. Please note that many states have similar benefits protection rights and might require a longer duration of protection.

If an employee is unable to work due to a workers' compensation injury for greater than a year, is the employer legally responsible for keeping them on payroll and paying for and/or offering health benefits?

It depends on the laws in the state where the injury is compensable.

If an employer does not have a job that accommodates the employee's disability, is the employer forced to create a new job that previously did not exist?

The ADAAA does not require an employer to create a job that does not currently exist.

What if an employer has several employees in a unit requesting a part-time schedule due to workers' compensation injuries? Should the employer simply deny those requests and keep employees on a leave?


This could be considered an undue hardship. The hardship analysis must be documented and substantiated.


What happens when an employee is out indefinitely? How long does the employer have to provide leave?

This is a case-by-case situation. You will need to assess the laws in the state where the employee works to determine the length of time. However, unlimited leave is generally not required.

Have any workers' compensation carriers been effective in helping employers coordinate benefits?

Employers are, ultimately, responsible for their accommodations and complying with ADAAA. Given the growing complexities with accommodations, employers are now outsourcing accommodations and the interactive process or creating an internal team to handle all accommodations. Workers' compensation carriers could potentially be helpful in the employer's





accommodation process by making sure to communicate information about the leave of absence and work restrictions to the employer.

What does an employer do when an employee's doctor's note for time off due to an off-duty injury expires and the employee does not bring in a new doctor's note allowing return to full job responsibilities or to continue job restrictions?

As part of the interactive process, the length of an accommodation is secured along with functionality information. If an employee is nearing the end of the accommodation, a conversation should take place regarding return to work.

Can the employer request a physician's note to prove disability – for example, wheelchair use?

The ADAAA states that an extensive analysis is not necessary to establish a disability, especially for those disabilities that can be seen. In the case of a wheelchair, an individual cannot perform the major life activity of walking. If the employee is requesting an accommodation of essential job functions outside of walking, and the disability is not obvious, the physician should outline the limitation.

Are 90-day modified duty programs with their own cost centers beneficial to employers?

This is a decision the employer should make on a case-by-case basis. A word of caution is to ensure such policies do not interfere with an employee's right to accommodation.


Are there good resources to assist in crafting job descriptions that contain OSHA- and ADAAA-compliant physical and occupational requirements?

There are firms who specialize in this area. You should consider engaging a consultant to assist in identifying proper resources to assist with this effort.

JOB ACCOMMODATIONS

How does an employer go about creating an interactive process to provide effective, reasonable accommodations for employees with disabilities?

To help determine effective accommodations, the Equal Employment Opportunity Commission (EEOC), recommends that employers use an "interactive process," which simply means that employers and employees with disabilities who request accommodations work together. Here are six recommended steps to develop an interactive process:

- Step 1: Recognizing an Accommodation Request
 - Step 2: Gathering Information
 - Step 3: Exploring Accommodation Options
 - Step 4: Choosing an Accommodation
 - Step 5: Implementing the Accommodation
 - Step 6: Monitoring the Accommodation
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Do accommodations include non-work-related injuries?

It doesn't matter how the employee became disabled and limited in their ability to perform the essential functions of the job. The interactive process should be performed.

Is there a timeframe to respond to a permanent and stationary (P&S) status to engage in the interactive process?

There is no specific timeframe. A good practice is to begin the interactive process at the point in which the employer is aware that the employee may have a disabling condition, which prevents them from performing the essential functions of their job.

How do you engage an employee who refuses to participate in the interactive process?

The employee is required to provide good faith effort to engage in the interactive process. If the employee does not engage, it is a good practice to document the lack of engagement and outline the ramifications of not doing so.

Can employers have different practices for workers' compensation versus non-workers' compensation? If so, where can they vary and where do they have to match?


To avoid the risk of litigation and violating ADAAA, employers should consider a consistent approach to accommodations and the interactive process. Accommodations may be appropriate under ADAAA regardless of a workers' compensation, short-term disability or leave of absence.

Do you engage in a formal interactive process when an employee is released from their workers' compensation injury with permanent restrictions?

The interactive process should begin well before an employee receives permanent restrictions. It is appropriate to begin the interactive process when an employee is off work or in advance of a planned absence (i.e. upcoming surgery that will take an at-work employee out of work for a period of time). The interactive process affords open dialogue regarding return-to-work options and considerations as it relates to having the employee back at work. Delaying or avoiding the interactive process places an employer at risk.

How does the interactive process apply if an employee has been out in excess of 12 weeks receiving disability benefits? When the employee is no longer considered disabled by the disability carrier and able to return to work (either their own job or another job), is the employer obligated to engage in the interactive process at this time?

If an employee is released to return to work without restrictions, the employee is not limited in their ability to perform the essential functions of the job, therefore, an accommodation assessment is not necessary. However, if the employee is released with restrictions that limit essential job functions, the interactive process should begin well before the end of a 12-week disability benefit. The threshold necessary to meet the definition of disability based on the plan may not be consistent with ADAAA. The interactive process should begin when it is known that the employee will stop working or once an absence has started. Failing to address the interactive process during a period of approved or denied disability places the employer at risk.





Does “accommodations” refer to both permanent and temporary? How long would an employer have to provide temporary accommodations on an employee on workers’ compensation if the employee is not progressing in restrictions?

“Accommodations” refers to both temporary or permanent. The Amendments Act cautions on only conducting the interactive process for permanent restrictions. In many cases, the temporary accommodation will only be in place for a set period of time, upon which an additional assessment could be performed if the accommodation need extends beyond the initial period.

Many large companies have a policy where they only accommodate light duty for 90 days. While consistent, does this create any issues with the accommodation requirements under ADAAA?

A policy limiting all accommodations to 90 days is problematic for employers and poses a litigation risk. Under ADAAA, employers must consider an individual's need for accommodations and may need to consider permanent accommodations as a reasonable accommodation.

How can and should you utilize fitness for duty exams in this process?

Fitness for duty evaluations may assist with providing an objective opinion regarding the employee's functional capacity and assist with the accommodation process or job placement, as applicable.

Our company vehicles are sedans. If an employee has a disability where the treating doctor says that a larger car would help the employee perform his job, is a larger car a reasonable accommodation?

There may be times when an accommodation is not reasonable for the employer to accommodate.


TERMINATION CONSIDERATIONS

Should termination be considered if a full 26-week short-term disability leave is exhausted and the employee cannot perform essential functions of his or her job with accommodation?

An employer has an affirmative duty to complete the interactive process to determine if an accommodation can be made. If the assessment finds that an accommodation cannot be reasonably made, it is recommended to conduct a job search for other potential positions that the employee could perform that match the employee's skills. In some states, such as California, if an employee is skilled and qualified for an open position, they must be considered for the position.

Should an employer terminate an employee that was approved for intermittent FMLA, but the case was closed due to paperwork not being completed and returned?

There are many factors that go into termination actions and should be discussed with legal counsel.





FRAUD

Do you find that some employees will get their doctor to write a note for them just to get what they want? If so, how should this be handled?

It is possible, however, this should not be an issue if the employer follows a consistent process for obtaining information from physicians.

How do you evaluate an employee's true need versus the employee that may want accommodations because they simply do not like their job? How do you recommend separating the two if medical documentation is not required in the interactive process?

Following a consistent process to obtain limitations from the physician can help in these situations. Remember, an employer is not required to provide an employee with the accommodation they request, but they must provide an accommodation that allows them to perform the essential functions of the job.

ADDITIONAL RESOURCES

Job Accommodation Network: askjan.org

Department of Labor: dol.gov

FMLA Insights Blog: FMLAInsights.com

