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Risk Management Is More Than Safety: Employment Law for Safety Managers

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Introduction

Injured or disabled employees, whether their injury was sustained on or off the job, may force an employer to step into an intricate web of interconnected leaves. For employers, it can be all too easy to become entangled in the many different, interlocking leave laws. An injured employee may be eligible for one, two, or more leaves concurrently and the employer's responsibilities under each may be triggered at different times and vary depending on the type of leave. Employers with the best intentions in attempting to comply with the law applicable to one form of leave, may violate another. Safety managers must work with the Human Resources manager to ensure full compliance with all leave laws.

Therefore, it's important that employers possess an accurate and up-to-date understanding of the various leave laws to avoid liability. Though it is not meant to be an exhaustive analysis on the issue of leaves, the discussion below will help employers better understand the basic issues and possible entanglements that arise under the applicable leave laws. If you have any questions or concerns regarding the applicability of any of these laws, it is best to approach an attorney and seek advice.

Leave Laws

Family And Medical Leave Act (FMLA)

The Family and Medical Leave Act (FMLA) requires covered employers to provide 12 or 26 workweeks of job protected leave to eligible employees for certain qualifying reasons.

Covered Employer

FMLA requires employers that fall under its provisions to provide up to 12 workweeks of leave to those eligible employees who have established a FMLA-qualifying reason for leave. The FMLA applies to: (1) employers that employ 50 or more employees in 20 or more workweeks in the current or preceding calendar year; (2) all public agencies, including state, local and federal employers, regardless of the number of employees; and (3) "local educational agencies" and private elementary and secondary schools.

For purposes of determining the FMLA coverage, every employee on an employer's payroll, including part-time employees, are counted each day of the week that the employee remains on the payroll. Though the employees must be employed for 20 calendar workweeks in the current or preceding year, employees need not be employed for 20 consecutive workweeks to be counted. Employees on a leave of absence or suspension must

be counted if they have a reasonable expectation of returning to active employment, while employees on layoff, whether temporary, indefinite or long-term, are not counted.

Eligible Employee

Employees are eligible for FMLA leave if they have: (1) been employed by a covered employer for at least 12 months, which need not be consecutive; (2) actually worked at least 1250 hours during the 12-month period immediately preceding the commencement of the leave; and (3) worked at a worksite where the employer has 50 or more employees within 75 miles. In determining the 1250 hour requirement, an employee who has returned from fulfilling National Guard or National Reserve military obligations must be credited with the hours he/she would have worked but for the military service.

Leave Available to the Employee

Once an employee is eligible to take FMLA leave, there may be a number of events that trigger the right to take time off. An eligible employee is entitled to up to 12 workweeks of unpaid leave in a 12-month period. The employee can take this leave on an intermittent or reduced work schedule basis.

Intermittent leave under FMLA is taken in separate blocks of time due to a single qualifying reason. A reduced-leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek or per day. Intermittent and reduced-schedule leave may be taken to care for a spouse, daughter, son, or parent with a serious health condition, or for the employee's own serious health condition only when it is medically necessary. Eligible employees are entitled to FMLA leave even if it causes an undue hardship.

Serious Health Condition

Employees may seek leave for their own serious health condition if that condition prevents them from performing one or more of the essential functions of their position. This term "essential functions" has been given the same definition as used under the Americans with Disabilities Act (ADA), which will be discussed below.

As contemplated by the FMLA, a "serious health condition" is a condition that involves: (1) inpatient care in a hospital, hospice, or residential medical care facility, or (2) continuing treatment by a healthcare provider. Cosmetic treatments that do not require inpatient hospital care are excluded from the definition of "serious medical condition." Generally, (absent complications) such conditions as the common cold, flu, earaches, and upset stomach are not serious health conditions.

Birth or Placement of a Child

An employee may take leave for the birth or placement of a child or for "baby bonding time." Unlike other leaves, leave for a birth or placement of a child cannot be taken intermittently or on a reduced leave schedule, unless the employer agrees to this schedule. Further, a mother and father who are both eligible employees employed by the same employer are limited to a combined total of 12 weeks for the birth or placement of a child.

An employer's agreement is not required for leave where the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

Caring for a Family Member

FMLA provides that an employee may take leave to care for a parent, spouse, son or daughter who has a serious health condition.

Under the FMLA, a parent means a biological, adoptive, step or foster father or mother, or any other individual who stood or stands *in loco parentis* to the employee. Care for parents-in-law is not covered by the FMLA, because they do not qualify under the terms of the Act.

Courts have found that "caring for" includes an employee who is directly involved in providing physical care or psychological support for a spouse or parent. There must be some form of direct interaction between the employee and the family member, however. Providing some form of support to a family member, while not actually being with him or interacting with him, most likely will not qualify for FMLA leave.

Military Leave

To Care For A Covered Service Member: The next of kin is the nearest blood relation other than the service member's spouse, parent, or child in the following order of priority: blood relations who have legal custody of service member by court decree or by statute, siblings, grandparents, aunts and/or uncles, and first cousins, unless the service member has designated next of kin in writing.

If the service member has not done so and multiple family members of the service member are of the same blood relationship with the service member, all may take FMLA leave to care for the service member, either consecutively or concurrently.

Exigency Leave: An eligible employee may take up to 12 workweeks of FMLA leave for any "qualifying exigency" arising out of events from a spouse, son, daughter, or parent being on active duty or a call to active duty in the armed forces. The service member must be undergoing medical treatment, recuperation, therapy in outpatient status or otherwise be on the temporary disability retired list for a "serious injury or illness."

Employee's Responsibility to Give Notice

Employees who want to take FMLA leave must provide the employer some notice stating that they will be taking a leave from work for a FMLA-qualifying reason. Employees need not expressly assert their rights under the FMLA, or even mention the FMLA, but they must provide sufficient information to suggest to the employer that the leave may be FMLA-qualifying. When this happens, an employer will be "expected to obtain any additional required information through informal means." Employers are entitled to sufficient information to determine "the legal rules governing leave . . . the sort of notice that will inform them not only that the FMLA may apply, but also when a given employee will return to work" (*Collins v. NTN-Bower Corp.).* While an employee does not have to use the magic letters, "FMLA," merely saying, "I am sick" or, "I need to see my father" is not sufficient.

Foreseeable Leave

With the exception of qualifying exigency leave, an employee must provide at least 30 days' advance notice before FMLA leave is to begin for a foreseeable reason. An employee who needs qualifying exigency leave must provide notice as soon as possible, regardless of how far in advance the leave is foreseeable. If 30 days notice is not possible due to a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given "as soon as practicable,"

given the facts and circumstances of the particular case, which generally should be the same day the employee learns of the need for leave or the next business day.

Although an employee needs to provide a minimum of 30 days' notice before leave is to begin for the birth of a child, a pregnant employee's health condition may require leave to begin earlier than anticipated before the birth of a child. In such circumstances, notice may be given "as soon as practicable."

Unforeseeable Leave

In the case where leave is not foreseeable, written advance notice may not be feasible or required. In such a situation, the employee must provide notice to the employer as soon as practicable, given the factual scenario. Generally, the employee should be able to comply with the employer's usual and customary notice requirements.

A member of the employee's family or other spokesperson also may give the notice if the employee is unable to do so personally. If the employee is seeking leave for a previously designated reason, the employee must specifically reference the reason.

Repercussions for Inadequate Notice

You may deny or delay FMLA leave if an employee does not provide adequate notice. Before an employer can take any steps to delay or deny an employee leave for lack of proper notice, "it must be clear that the employee had actual notice of the FMLA notice requirements."This requirement can be satisfied by a showing that the employer has properly posted the required FMLA notice at the worksite where the employee is employed, and that the employer has provided the required notice in either an employee handbook or employee distribution.

Employer Rights

Medical Certification: When an employee seeks leave under FMLA, you have the right to request medical documentation certifying the serious health condition and the need for leave. If the employee's condition prevents the employee from performing one or more of the essential functions of the job, you may critically review information from a healthcare provider to examine whether the employee's reason for requesting leave is sufficient, but you are not required to obtain medical certification.

An eligible employee who is absent from work for a week due to a serious medical condition may have the leave counted toward his FMLA entitlement if the employer designates the absence as FMLA leave, even if the employee has not requested that the absence be treated as such. An employer cannot use an FMLA-qualifying absence from work as the basis for an adverse employment action against the employee.

Fitness-for-Duty Certification: You may require all similarly situated employees who take FMLA leave to obtain certification from a healthcare provider that the employee can return to work. You may also require certification to specifically address the employee's ability to perform the essential functions of the job. An employer may clarify and authenticate the certification, but may not delay an employee's return to work while doing so.

Second or third opinions on fitness for duty certifications are prohibited. If you have provided notice that the certification is required, and the employee does not provide one, you may delay restoration until the employee does so. You may even terminate an employee who refuses to provide the certification and does not provide a certification that additional leave is required.

Employer's Responsibility

Eligibility, Rights, and Responsibilities Notice: When an employee requests FMLA leave, or the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee within five business days whether the employee is eligible for FMLA leave (and if not, provide an explanation). This notice must also indicate the employer's specific expectations, the employee's obligations, and the consequences of failing to meet these expectations or obligations. You should also provide the applicable certification to support the need for leave.

Although key employees are entitled to the same leave as other employees, they may not be entitled to the same restoration as other employees. The Act provides that an employer may deny reinstatement to a key employee when it is necessary to prevent substantial and grievous economic injury to the employer's operations. A key employee is considered to be a "salaried eligible employee" who is among the highest paid 10% of the employees employed by the employer within 75 miles of the facility at which the employee works. An employer must notify key employees of their status in the Notice of Eligibility and Rights and Responsibilities.

Designation of Leave: Within five days of receiving sufficient notice of potentially FMLA-qualifying leave, an employer must designate a leave as FMLA and give notice of the designation to the employee. If you do not initially designate the leave as FMLA-qualifying, you may retroactively do so with notice to the employee, if doing so does not prejudice the employee. If the employer and employee disagree whether the leave is FMLA-qualifying, try to resolve the designation through meeting with the employee and memorialize the resulting decision.

Return to Work

Except for certain highly compensated "key" employees, eligible employees who take FMLA leave and return upon exhaustion of the leave are entitled to be restored to their previous position or to a substantially equivalent position. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions.

If an employee is unable to perform an essential function of the position, even with an accommodation (if required), the employee has no right to transfer to another position under the FMLA. Nevertheless, as discussed below, you may have an obligation to transfer the employee to another position as a reasonable accommodation under the Americans with Disabilities Act (ADA).

An employee is entitled to any unconditional pay increases that may have occurred during the FMLA leave period, e.g., a cost-of-living increase. Nevertheless, pay increases that are conditioned upon seniority, length of service, or work performed need not be granted unless it is the employer's policy or practice to do so with respect to other employees on equivalent leave status.

The Act specifically provides that an employer is required to maintain group health benefits during any period of FMLA leave. Regarding employment benefits, there are two main provisions: (1) an employer is required to maintain the group health plan coverage for the entire period an employee is on FMLA leave; and (2) the taking of any FMLA leave cannot result in the loss of any employment benefit an employee accrued prior to taking leave.

If an employee fails to return to work at the end of the leave period, you may recover the cost for maintaining coverage for the employee under the group health plan, unless the reason for the failure to return is because of the continuation of a serious health condition involving care for the employee or a family member, or other circumstances beyond the employee's control. If employees provide a medical certification verifying that they cannot return to work, you cannot recover the cost of group healthcare benefits.

American with Disabilities Act (ADA)

Title I of the ADA makes it unlawful for covered employers to discriminate against a *qualified individual* with a disability. Title I also requires employers to provide individuals with disabilities with *reasonable accommodations,* unless doing so would cause the employer to suffer an *undue hardship.* Courts have held that modifying employees' schedules, providing predictable intermittent time-off or a leave of absence may be reasonable accommodations.

Covered Employers

The ADA defines *employer* as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."

Disability

Disability is a physical or mental impairment that substantially limits one more of the person's major life activities, which includes major body functions, as compared to most people in the general population, having a record of such an impairment, or being regarded as having such an impairment.

A "regarded as" disability is established when an employee shows an actual or perceived impairment, whether or not the employer perceives the impairment to substantially limit a major life activity and that the employer took adverse action. Transitory and minor impairments, i.e., those lasting less than six months, cannot be used to establish a "regarded as" claim.

Qualified Individual

A *qualified individual with a disability* is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position that the individual holds or desires.

Essential Job Functions

The first step an employer may need to take is to determine whether the individual can perform the essential functions of the position held or desired. In defining what functions are essential to a particular job, courts look to the fundamental job duties of the employment position. In evaluating whether a function is essential, the courts will evaluate the following:

- Is the function in the job description, and if so, do other employees in the position perform the function?
- Would removing the function fundamentally alter the position?
- Does the position exist for the function?
- Are there a limited number of employees to perform the function?

- Is the function highly specialized such that the employee was hired for the specific function?

Leave as a Reasonable Accommodation

Reasonable accommodation may include providing an employee with unpaid leave for a disability, a reduced work schedule, or planned intermittent leave unless the employee's absence imposes an undue hardship.

There are two other types of leave requests that the courts have found to be unreasonable as a matter of law. The first involves leave that is so erratic that the employer does not know from one day to the next whether the employee will come to work or what time the employee might arrive. The second involves requests for leave where the employee would still not be qualified upon returning from leave. For example, an employee whose job requires mandatory overtime no longer can work overtime. Since overtime is an essential job function, the employer is not required to eliminate it to accommodate the employee. The employee is not "otherwise qualified."

The EEOC has stated that you may deny leave to an employee who cannot provide a definite date to return only if you can show undue hardship based on the employee's inability to provide a date of return. But the courts have almost uniformly held that indefinite leave need not be provided as a reasonable accommodation, since the purpose of an accommodation is to assist the employee in doing the job as opposed to protecting an employee who cannot perform the job. Moreover, repeated requests for extension of leave may be unreasonable. You may not assume that the leave is indefinite, however.

Courts have held that employees who request leaves that exceed one year are not otherwise qualified as a matter of law. In cases involving a request for leave that is less than one year, the courts have held that the requested accommodation was reasonable or at least that there was a genuine issue of material fact as to its reasonableness.

The EEOC takes the position that during unpaid leave, an employer must hold open an employee's job unless the employer can show that doing so would impose an undue hardship. The EEOC further maintains that if, during the leave the employer realizes it can no longer hold the employee's job open, the employer must evaluate whether there are available positions for which the employee is qualified and into which the employee can be transferred at the end of the leave.

The EEOC also takes the position that you may not apply to a disabled employee a "no-fault" leave policy under which employees are automatically terminated after they have been on leave for a certain period of time. According to the EEOC, an employer must modify a no-fault leave policy to provide a disabled employee with additional leave unless it can show either that: (1) there is another effective accommodation that would enable the employee to perform the essential functions of the position; or (2) granting additional leave would cause an undue hardship.

When Employers Need Not Provide a Reasonable Accommodation

Harm to Others: You will not be required to provide a reasonable accommodation for an employee who qualifies under the ADA or to allow the employee to return to employment, if doing so will cause harm to other individuals. Specifically, you will need to show that the individual with a disability poses immediate risk of significant harm to the health or safety of the individual or others, and that this risk cannot be eliminated through reasonable accommodation.

Undue Hardship: You are not required to provide a disabled employee a reasonable accommodation if it is an undue hardship. To determine whether an accommodation is an undue hardship, courts apply a cost-benefit analysis. Specifically, employers will not be required to provide the accommodation where the costs of the accommodation are excessive in relation to its benefits or where the costs threaten an employer's financial survival.

However, it can be quite difficult to establish undue hardship based on cost. Some circuits have recognized undue hardship based on the effect of the accommodation on coworkers, i.e., whether they have to work harder or work longer hours because of the accommodation.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) was signed into law on October 13, 1994, following the Persian Gulf War. Compared to its predecessors, USERRA significantly expanded veterans' job rights in the areas of anti-discrimination, benefit coverage, and disability protection. Pertinent to leave laws, USERRA requires employers to provide job-protected leave and certain benefits to employees who are also uniformed service members.

Covered Employers

USERRA applies to virtually all U.S. employers, regardless of size. Specifically, USERRA applies to any "person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment." This definition extends to the successors in interest and assigns of an employer.

Covered Employees

Employees who perform duty, whether voluntary or involuntary, in time of peace or war, in the "uniformed services," which include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services, are eligible for coverage under USERRA. Federal training or service in the Army National Guard and Air National Guard also gives rise to rights under USERRA.

Uniformed service includes active duty, active duty for training, inactive duty training (such as drills), initial active-duty training, funeral honors performed by National Guard and reserve members, and the period during which a person is absent from employment for a physical examination to determine fitness to perform military duty. Uniformed services may also include any other category of persons so designated by the President in time of war or national emergency.

USERRA covers most all types of employees. Executive, managerial, professional, temporary, part-time, and seasonal employees are all entitled to rights, assuming they satisfy the other qualifications. Additionally, employees who have been laid off with recall rights and those involved in a strike may also qualify. Individuals employed in brief, non-recurring positions, with no reasonable expectation of continued employment, are covered by the non-discrimination provision of USERRA, but do not have reemployment rights. An example of such a position would be a limited duration summer job. Independent contractors are not considered "employees" under USERRA.

Reemployment Provisions

An employee returning from military leave generally is entitled to reemployment. Typically, as a condition of exercising this right, the employee must give the employer advance notice of the military service, the cumulative length of absences for military service from that employer must not exceed five years, and the employee must apply for reemployment in accordance with the requirements of USERRA.

Notice

In order to receive USERRA rights, employees must provide their employers with advance notice of military service. Notice may be either written or oral, and may be provided by the employee or by an appropriate military officer. No notice is required if military necessity, as determined by a designated military authority, prevents the notice or notice is otherwise impossible or unreasonable.

Length of Absence

In order for the employee to preserve entitlement to reemployment, the cumulative length of military leave may not exceed five years. However, many types of military service are not included in the determination of this five-year period. Additionally, certain "less than honorable" discharges, such as a discharge for bad conduct or a dishonorable discharge, disqualify a person from USERRA coverage.

Categories of service not counting against the five-year limitation include:

- service of more than five years to complete a period of obligated military duty or to fulfill training requirements;
- required training for reservists and National Guard members;
- involuntary active duty service during a domestic emergency or national security situation;
- service on active duty because of a war or national emergency declared by the President or Congress;
- active duty (other than for training) by certain volunteers;
- service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency when no involuntary call up is in effect;
- federal service by members of the National Guard called into action by the President; and
- service performed to mitigate economic harm when an employer is in violation of its obligations under USERRA.

Reemployment Under USERRA

An employee must apply for reinstatement within a specific time period, depending on the employee's length of service.

If the military service was less than 30 days in duration, the employee must report back by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military-duty location and an eight-hour rest period.

If the military service was between 31 and 180 days in length, the employee must apply for reinstatement within 14 days of release from active service. If submission of a timely application is impossible, the application must be submitted as soon as possible. Note that if employees wish to return to work immediately, the employer must reinstate them as soon as possible. But the employees may, at their own choice, delay returning to work until the 14th day.

If the military service was more than 180 days in length, an application for reemployment must be submitted no later than 90 days after completion of an employee's military service. Again, if an employee wishes to return to work immediately, the employer must offer reinstatement as soon as possible, but the employee may choose to delay returning to work until the 90th day.

Employees recovering from a service-related injury or illness may extend these deadlines by up to two years. For a serviceperson who returns with a disability, you must take reasonable steps to provide an accommodation for the disability. If the serviceperson is not qualified for the position even with reasonable accommodation, you should next attempt to place the serviceperson in a position with equivalent seniority, status, and pay, so long as the employee is qualified.

An employee's failure to timely report or apply for reemployment will not automatically disqualify the employee from USERRA reemployment rights. Rather, the employee is subject to the employer's established policies or practices pertaining to explanations and discipline for unexcused absences.

The Escalator Provision

Generally, you are obligated to reemploy an employee returning from military leave in the same job or position the employee enjoyed before going on military leave. Further, returning veterans must be placed in the position they would have had but for military service. This requirement is often referred to as the *escalator provision* or *escalator principle.* The escalator provision requires that each returning service member actually step back onto the seniority "escalator" at the point the person reasonably would have occupied if the person had remained continuously employed.

The returning employee must either be qualified for the position or have the ability to become qualified after reasonable efforts. If employees cannot become qualified for the position that they would have had without the absence, you must reinstate them to their pre-service position. If employees are no longer qualified or cannot become qualified for the pre-service position, you must place them in another position (with full seniority) that they are qualified to perform.

You do not have to reemploy an employee who fails to timely report or reapply, provided that similarly situated employees not returning from military leave would have been terminated or not allowed to work. As discussed previously, you have the right to request documentation from the employee to verify the existence of any of these circumstances. If documentation is not readily available to the employee, you must

promptly reemploy the employee and can terminate the employee later if documentation shows that one or more of these reemployment requirements were not met.

Reemployment of a veteran is excused if an employer's circumstances have changed so much that reemployment would be impossible or unreasonable. For example, if an employer has closed the portion of its business where the employee had worked and terminated the other employees who worked there, the employer would be excused from reinstating the employee to any position. You are also excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause undue hardship.

If the employee's company was purchased by another company while the employee was on active duty, the buyer can, under certain circumstances, be obligated to reinstate the employee, even though it never actually employed him.

Employee Rights

The following concerns the rights of employees returning leave for military service.

Health Plans

When employees go on military leave, they are entitled to COBRA-like coverage for themselves and their dependents if your health plan offers dependent coverage (even if you are not otherwise subject to COBRA because you employ fewer than 20 employees, and even if the employee has health benefit coverage from the military). Upon return, no waiting period or exclusion (such as a pre-existing condition limitation) can be imposed if none would have applied had the employee been in active employment during military service (although there is an exception in the case of service-connected disabilities).

Disabilities

USERRA's disability provisions require employers to reemploy individuals with service-connected disabilities or disabilities aggravated by their service, who are not qualified to return to their last position (or to the position they would have attained but for military service) into another position of similar seniority, status and pay for which the individual is qualified (or would become qualified through the reasonable accommodation efforts). Failing this, the person must be returned to a position "which is the nearest approximation consistent with the circumstances of the individual's case."

Seniority

Reemployed service members are entitled to seniority and all rights and benefits, based on seniority that they would have attained with reasonable certainty had they remained continuously employed. A right or benefit is seniority-based if it is determined by length of service (e.g., a vacation program where the amount of vacation earned increases with the employee's length of service). A right or benefit is not seniority-based if it is compensation for work performed or is subject to a significant contingency, e.g., a production bonus.

Vacation and Other Leave

Service members do not earn vacation while they are on active duty. However, as noted above, the amount of vacation they earn when they return will be the same amount as if they had not left. For example, an employee with four years of service goes on active duty for one year. When he/she returns, he/she will earn vacation as if he/she had been with the company for five full years.

Service members are expressly allowed to choose to use accrued vacation, annual or other similar leave with pay while on military leave, but may not be required to do so. It is a violation of USERRA for an employer to require a service member to use paid or unpaid vacation, annual, or other similar leave when the service member does not ask to use such leave. However, nothing in USERRA precludes an employer from enforcing a "use-it-or-lose-it" policy with respect to accrued vacation pay, so long as military employees are treated the same as similarly situated, non-uniformed personnel.

Interaction with Employer Leave Policies

Departing service members must be treated as if they are on a leave of absence. While these individuals are away, they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of nonmilitary leaves of absence, the service member is entitled to the most favorable treatment so long as the nonmilitary leave is comparable.

Returning employees are entitled not only to non-seniority rights and benefits available at the time they left for military service (assuming these rights and benefits are still available for comparable employees who did not go on leave), but also rights and benefits that first became effective during their service.

An employee can forfeit rights by providing a clear written notice of intent not to return to work after military service. Such a notice will waive the employee's entitlement to equal leave-of-absence rights and benefits not based on seniority. Employees cannot surrender other rights and benefits that a person would be entitled to under law, particularly reemployment rights. If employees do not return from military leave, their seniority is normally broken as of the date they went on leave.

Workers' Compensation Leave

At the outset, it bears noting that "workers' compensation leave" does not exist. Instead, if an employee suffers a workplace injury, the employee's right to what often is called "disability leave" is determined by the application of various laws. Foremost among these laws are the leave rights FMLA creates, as well as the rights disability discrimination laws like the ADA create. Therefore, any analysis of which employees are covered and what employers are subject to requirements of "workers' compensation leave" is moot. But for the purposes of this discussion, the term "workers' compensation leave" will be used for clarity.

Covered Employers

Virtually all employers are covered by workers' compensation laws, with coverage beginning when an employer has between one and five employees--depending on the state. Each state defines who is a covered employee, but independent contractors are typically excluded.

Employee Rights

Vacation: While on workers' compensation leave, an employee does not accrue vacation. As with employee benefits generally, vacation is solely a matter of contract between the employer and employee. Thus, absent a more generous policy in your employee handbook, you need not permit your employees to accrue vacation while on leave for a work injury.

Seniority: When an employee takes leave due to workplace injury, the key rule as to seniority is as follows: Unless an employer's policy provides for better seniority status rights, an employer must maintain the seniority level of an employee on disability leave and cannot take a detrimental action against the employee's seniority rank. Also, if an employer provides for seniority accrual for other types of leaves of absence, then the seniority accrual for those on disability leave must mirror the other accrual rights. Generally, upon the employee's reinstatement after disability leave, the employee's pre-leave seniority level attaches.

Medical Information Gathering

As a general rule, state workers' compensation laws relative to the gathering of medical information in conjunction with a workplace injury, will not be displaced by or violate either the ADA or FMLA. The FMLA regulations provide that when the "serious health condition" is a result of a work-related injury and the employee is being treated under workers' compensation, an employer may follow the provisions of the workers' compensation law as it regards medical information on the employee's condition.

The EEOC's *Guidance on the ADA and Workers' Compensation* indicates that disability-related inquiries of current employees, for the purpose of determining the extent of an employer's workers' compensation liability, is permissible as long as the gathering was "limited in scope to the specific occupational injury and its effect on the individual and may not be required more often than is necessary to determine an individual's initial or continued eligibility for workers' compensation benefits."

Workers' Compensation Leave and FMLA

The problem the FMLA presents to most employers, as it relates to workers' compensation, is that employers often fail to recognize that a leave of absence caused by a workplace injury is eligible for FMLA protection. Therefore, employers frequently fail to designate the leave as FMLA-qualifying.

Combating this problem requires recognition of and attention to the fact that any serious workers' compensation injury will result in the employee needing a leave of absence that will be protected by the FMLA. Employers must put in place, as part of the administration of their workers' compensation practices, an administrative step for recognizing and designating workers' compensation leaves as FMLA leaves. Only by doing this will you avoid employees' maintaining FMLA protection long after it should have been exhausted.

The second step is recognizing the FMLA rights of an injured employee who returns to work prior to the exhaustion of the 12-week entitlement. Such employees are entitled to job and benefit restoration. Remember that an employer cannot force employees on FMLA leave to come back to work if they are less than fully capable of performing the duties of their former position.

Thus, an employee cleared for light-duty work after six weeks of leave cannot be forced to report for work or forfeit the job. Rather, employees are entitled to take the full 12 weeks of leave, assuming they do not become fit to return to their old job during that period. This does not affect the employer's right to cut off workers' compensation payments based on the employee's failure to report, but the employee cannot be fired.

The Interplay of the ADA, FMLA and Workers' Compensation

This section discusses the interplay of the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and workers' compensation as they pertain to employee leaves of absence.

Employees Covered Under Multiple Statutes

The FMLA applies only to *current* employees of a covered employer. Similarly, workers' compensation laws and USERRA, generally, apply to *current* employees of covered employers. The ADA, on the other hand, protects applicants for employment, employees, and former employees if they are qualified individuals with a disability.

Leaves and Reasonable Accommodations

An employee who is eligible for FMLA leave is entitled to take leave for a total of 12 or 26 workweeks during any 12-month period, depending on the qualifying reason. This leave must be provided even if it causes an undue hardship. In contrast, unpaid leave under the ADA is subject to an undue hardship analysis. Further, reduced schedule leave or planned intermittent leave may be required under the FMLA. Under the ADA, even if it is a reasonable accommodation, it also is subject to an undue hardship analysis. Further, erratic, sporadic intermittent leave is not a reasonable accommodation under the ADA and may render an employee not otherwise qualified.

If an employee is entitled to FMLA leave, you may not require the employee to take a "light-duty" job or accept a reasonable accommodation that would allow the employee to continue working. At the same time, however, the ADA may require the same employer to offer an employee a reasonable accommodation.

Things may become even more confusing when the injury takes place while the employee is working. An employee may be absent from work due to a compensable injury or illness under workers' compensation law, which also qualifies as a serious health condition under the FMLA. Thus, workers' compensation absence and FMLA leave may run concurrently.

Finally, if an employee is a "qualified individual with a disability," he/she will have rights under the ADA, which may include reassignment or transfer to an open position that the employee can perform with or without a reasonable accommodation.

Benefits While Absent from Work

As discussed above, FMLA requires employers to maintain an employee's group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period. The ADA has no similar requirement, unless other employees receive health insurance during equivalent forms of leave, and the failure to maintain coverage for disabled employees would result in discrimination.

Thus, an employee who is a "qualified individual with a disability," who is also on FMLA leave, is entitled under the FMLA to have the employer maintain group health plan coverage during the leave, even though the ADA does not require it. If the employee exhausts his/her remaining FMLA leave working a reduced schedule, and is unable to return to the same full-time position at that time, you might have to allow the employee to work part-time for a finite period or transfer the employee into a part-time position as a

reasonable accommodation if doing so is not an undue hardship. In this case, the employee would be entitled only to those benefits that are ordinarily provided to part-time employees.

Under USERRA, employers are required to provide COBRA-like benefits to employees on military leave and their dependents, if the plan offers dependent coverage, even where the employer is not otherwise subject to COBRA. Generally, upon return, no waiting period, exclusion, or pre-existing condition limitation can be imposed upon the employee if none would have applied had the employee been in active employment during military service.

Medical Information

The ADA requires that medical examinations and inquiries of employees be job-related and consistent with business necessity. A certification or recertification under FMLA meets this standard, as does information gathering for purposes of workers' compensation benefits.

Return To Work

Employees covered under any of these laws who assert that they are ready to return to work present an employer with differing obligations related to reinstatement or reassignment to a different position. Under the FMLA, if an employee is unable to return to work after a 12-week absence, then you must consider whether the employee is disabled and entitled to more leave as an accommodation. Furthermore, when an employee has taken leave as a reasonable accommodation under the ADA, you may be required to return the employee to the same position unless it would cause an undue hardship.

If it would be an undue hardship, you must consider whether there is a vacant available position for which the employee is qualified into which you can transfer the employee and hold until the employee returns. If not, you may be able to terminate the employee's employment. Assuming that the employees are able to perform the essential functions of their job, they must be returned to the same or equivalent position with equivalent pay when they return from FMLA leave.

Remember that any employee returning to the workplace after military service must generally be returned to the position they would have obtained had they been employed throughout the duration of their leave. This escalator provision is unique to USERRA and can present problems to employers who neglect it.