

The Bermuda Triangle:

The Interplay of Workers' Compensation, ADA/WVHRA, and FMLA in Return to Work Issues

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- **Why Managing the Employee's Return to Work After Injury or Illness is Important:**
 - The National Safety Council estimates that there are 80 million lost work days due to occupational injuries or illnesses per year.
 - The Bureau of Labor Statistics reported that 1.2 million employees lost an average of seven work days due to injury or illness.

- **West Va. Workers' Compensation Act;**
- **Americans with Disabilities Act and/or West Va. Human Rights Act; and**
- **Family Medical Leave Act**

Remember two general rules:

1. Federal law provides a baseline from which we will work; and
2. State law *supplements* federal law.

1. Our Workers' Compensation Act requires re-employment of employees at pre-injury employment upon achievement of maximum medical improvement.
2. If employee is medically unable to return to pre-injury employment, W. Va. C.S.R. § 85-15 provides a hierarchy of acceptable training and re-employment

- **Once the Injury is Shown to be Work-Related, What is the Scope of the Compensable Injury?:**
 - When the primary injury is shown to have arisen in the course of and resulting from employment, *every natural consequence that flows from the injury* likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the employee's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening non-work-related cause.

- **Post-Primary Injury: Direct and Natural Consequence Rule**
 - **General Rule:** A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.
 - When considering whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon concepts of “direct and natural results,” and of the claimant’s own conduct as an independent intervening cause.

When can the employee come back to work?

- Finding of maximum medical improvement
- Medical authorization to return to light duty or full duty
- Can the employee safely perform essential functions of the pre-injury position?
- If the employee cannot safely perform the pre-injury position, is there a comparable position in wages, working conditions and, to the extent reasonably practicable, duties? If not, is there any available alternate position or employment?

- Vocational Rehabilitation Hierarchy
 - Pre-injury employment
 - Pre-injury employment *with modification*
 - Same employer, new position
 - Same employer, new position w/ OTJ training
 - New employer without retraining
 - New employer w/ OTJ training
 - Retraining program

- TTD vs. TPR in light duty scenario
 - Temporary Partial Rehabilitation benefits are aimed to make up the difference, if any, between pre-injury and post-injury wages.
 - Must have a qualified rehabilitation plan
 - TPR benefits make up 70% of any difference in wages between pre-injury and post-injury wages.

- What happens if we don't comply with the vocational rehabilitation standards?
 - We don't know for sure yet, but take a look at W. Va. Code § § 23-5A-1 and -3.

How do we make the ADA/WVHRA work with state workers' compensation acts?

Americans With Disabilities Act (ADA)

- **Is the employer covered by the ADA?**
 - ADA applies to employers of 15 or more who are engaged in interstate commerce.
- **Who has a “disability” for ADA purposes?**
 - A person is disabled under the ADA if:
 - 1) he or she has a physical or mental impairment that substantially limits one or more of his or her major life activities;
 - 2) has a record of such an impairment; *OR*
 - 3) has been “regarded as” having such an impairment, meaning that he or she has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment regardless of whether the actual or perceived impairment limits a major life activity.
 - Does not include transitory (< 6 months) or minor impairments.

- **“Significantly restricts” means:**
 - We’re not sure yet, but . . .
 - It is broader than the old “substantially limits” standard: The inability to perform a major life activity that the average person in the general population can perform.
- **What qualifies as a “major life activity”?:**
 - Major life activities include, but are not limited to functions such as caring for one’s self, performing manual tasks, eating, walking, lifting, reading, thinking, sleeping, standing, bending, concentrating, communicating, seeing, hearing, breathing, learning, working, etc.

- **Prohibited Examinations and Inquiries:**
 - An employer *shall not* require a medical examination and *shall not* make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability unless such examination or inquiry is shown to be job-related and consistent with business necessity.
- **Acceptable Examinations and Inquiries:**
 - An employer may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. An employer may make inquiries into the ability of an employee to perform job-related functions.

- **Employer’s Duty to Provide Reasonable Accommodations:**
 - A person with a disability may request a reasonable accommodation from his or her employer to aid in performing the essential functions of his or her job.
 - Does not apply to individuals meeting *only* the “regarded/perceived as having” prong of the disability test.
- **The Meaning of “Essential Function”:**
 - The reason the job exists is to perform that function;
 - The function is essential because of the limited number of employees available to perform the function; *OR*
 - The function may be essential because of the amount of time spent performing the job.

Americans With Disabilities Act (ADA)

- **What is a “Reasonable Accommodation?”:**
 - An accommodation can take several forms: job modifications, restructuring or adjustments, modifying work schedules, reassignment to a vacant position the person is qualified and capable to perform, providing adaptive aids, or additional leave.
- **“Interactive Process”:**
 - When a “disabled” employee requests an accommodation, the employer must enter into discussions with the employee to determine the nature of the accommodation.
 - The accommodation does not need to be the exact accommodation requested, so long as it effectively allows the employee to perform the essential functions of his or her job.
 - **Exception:** The employer need not provide the accommodation if it would impose an “undue hardship” on the employer. Factors include the nature and cost of accommodation, and the size and resources of the employer.

How do we make FMLA work in return to work scenarios?

- **The FMLA Provides:**

- 12 weeks of unpaid leave for employees during a 12 month period for:
 - The birth, adoption or placement of a foster child;
 - The care of a spouse, child or parent with a serious health condition; *OR*
 - An employee whose serious health condition renders him/her unable to perform the essential functions of his/her job—like a work-related injury!
- “serious health condition” - An illness, injury, impairment or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider.

- **What Employers Are Covered by the FMLA?:**

- Private employers who have at least 50 employees (including temporary employees) for each work day during each of 20 or more calendar workweeks in the current or calendar year
- Public employers without regard to the number of employees;
- However: private and public employees are not eligible for leave unless there are 50 or more employees within 75 miles of the worksite.

- **Who is Eligible for FMLA Benefits?:**
 - Employees who have:
 - a.) worked a minimum of 12 months (non-consecutive), and
 - b.) worked a minimum of 1,250 hours during the 12 months preceding the initial FMLA leave, and
 - c.) been employed at a site within 75 miles of a site with at least 50 employees, and
 - d.) have not already exhausted their leave entitlement.

- **How is FMLA Leave Triggered?:**
 - Eligible employee's request, or
 - Employer's designation
 - Includes paid leave, including workers' compensation
- **The procedure an employee should follow in applying for FMLA leave:**
 - Give 30 days notice where foreseeable, and as soon as practicable in the case of emergencies;
 - Submit medical certification;
 - Submit to independent medical examination if requested

- **Has the employee provided a sufficient return to work certification?**
 - If not, further inquiry may be necessary, such as a 2nd medical opinion to determine if the employee can perform the essential functions of her job.
 - Be very careful. Further inquiry here should not be arbitrary, but should be based on some objective reason that the employee may not be able to perform the essential functions of his/her job.
 - The employee must be allowed to work once a return to work notice is supplied, even during an investigation, if the employer chooses to conduct one.

- **Intermittent Leave and FMLA:**
 - With proper certification, an employee may take leave on an intermittent or reduced schedule basis (as opposed to a set period) if the situation requires.
 - Intermittent – series of absences (regular or irregular) for a single qualifying reason
 - Reduced – partial schedule

- **Requirements of Intermittent Leave:**
 - Must be medically necessary
 - Employee must attempt to schedule in a way that minimizes disruption to operations
 - Employer may transfer employee to alternative position for duration of leave
 - Alternative position must have equivalent pay and benefits
 - At end of leave, employee must be returned to his/her original position

- **FMLA and Medical Certification:**
 - The employee is only required to provide medical certification at the time of the initial request for leave. She does not have to provide additional certification for each absence thereafter for the same condition.
 - The employer is entitled to updates on the employee's condition, but not more than every 30 days, unless:
 - Significant Change in Circumstances
 - Information casts doubt on the validity of the leave

Can we run FMLA simultaneously with workers' comp? It depends . . .

1. What does your policy say?
2. If your policy allows for FMLA leave to run concurrently with workers' compensation leave, do it.

Managing The Employee's Return to Work

- **Functional Capacity Evaluations:**
 - Legally defensible research-based objective testing protocols to determine an individual's ability to perform essential job functions
 - Comprehensive Functional Capacity Evaluation
 - Fitness for Duty Capacity Evaluation
 - FCEs establish baseline levels of functional capacity to reduce future rehabilitation, disability, and workers' compensation costs

Voc Rehab and Work-Hardening

Most state workers' comp acts provide for voc rehab if the claimant cannot return to full duty.

Remember:

An employer cannot substitute voc rehab for a reasonable accommodation under the ADA.

- **Interactive Process:** An ongoing dialogue between employer and employee with the objective of finding reasonable accommodations by which the injured employee can perform the essential functions of her job. There are of four general steps:
 1. Employer analyzes particular job involved to determine its purpose and essential functions.
 2. Employer and employee review the employee's abilities and limitations.
 3. Employer and employee identify a possible range of accommodations which would allow employee to perform essential functions of job.
 4. Employer assesses the effectiveness of each accommodation, the employee's preference and whether providing the accommodation would impose an undue burden on the employer.
- Note: Employer need not provide employee with her first choice of accommodation(s), so long as the accommodation effectively allows the employee to perform the essential functions of the job. Also, an employer does not need to provide an accommodation if doing so would impose an undue burden on the employer.

- **Suggestions for Managing the Return to Work:**

- Create a detailed case file
 - A detailed case file will provide you with a record of all correspondence with employees, health specialists, and other stakeholders, in the event that any misunderstandings arise
 - A detailed case file will also document and demonstrate your efforts to meet your duty to accommodate
- Review any medical information submitted by the employee
 - It is important that you are certain about the employee's capabilities and limitations related to his/her job duties.
- Request employee's consent to obtain further medical records
 - Meeting the employee's accommodation needs requires making informed decisions. Detailed information about the employee's limitations and abilities will serve to help the accommodation process.

- Does everyone with an occupational injury have a “disability” under the ADA?
- May an employer ask disability-related questions or require a medical examination when an injured employee seeks a return to work?
- If an injured employee seeks reasonable accommodation, may the employer request medical documentation regarding the disability?

- May an employer require that an injured employee return to “full duty?”
- May an employer deny return to work based on a belief that the employee has an increased risk of reinjury (and increased workers’ comp costs)?
- May an employer run FMLA leave simultaneously with workers’ comp leave?
- Does an employer have a duty to protect employee health information?

Questions or Comments?