

Unraveling the Overlapping Employee Leave Laws

Presented by James M. Shaker

The authors of Family Leave Laws, Disability Laws, Workers' Compensation Laws, Military Leave Laws, and Pregnancy Leave Laws, both federal and state, have not coordinated with each other as to how the different leave laws would interrelate with each other. Not only do the federal laws not take into account the various state laws, including those of Washington State, but employers are left with looking at each and trying to determine how to calculate leave for the affected employees.

The principal federal laws are the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). In Washington we have a similar family leave act and disability leave act, namely the Washington Law Against Discrimination (relating to disability) and the Washington Family Leave Act (WFLA). In addition, in Washington we have the Washington Family Care Act (WFCA), Pregnancy Disability Leave (PDL), the Washington Military Family Leave Act (WMFLA) and Domestic Violence Leave (DVL). If you also consider our comprehensive workers' compensation laws, employers can be easily overwhelmed when attempting to navigate the various disability, family leave and injured workers laws.

The following is a brief synopsis of these laws and how Employers can best consider situations involving their employees.

I. Washington Law Against Discrimination/Disability

The Washington Law Against Discrimination prohibits employers with eight or more employees from discriminating on the basis of disability. Washington courts have held disability discrimination contravenes a clear mandate of public policy. Accordingly, Washington courts have held an employee can bring a disability discrimination claim even when the eight-employee threshold is not met and the employer has less than eight employees.¹ The Washington State Human Rights Commission ("WSHRC") defines disability for purposes of determining whether an unfair practice under RCW 49.60.180 as follows:

The presence of a sensory, mental, or physical handicap includes, but is not limited to, circumstances where a sensory, mental, or physical condition:

1. Is medically cognizable or diagnosable;
2. Exists as a record or history; or
3. Is perceived to exist, whether or not it exists in fact.

¹ *Sedlacek v. Hillis*, 104 Wn. App. 1, 3 P.3d 767 (2000).



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The presence of a “disability” requires both (1) an abnormal condition and (2) employer discrimination because of that condition.² Under Washington law, a disability is a sensory, medical or physical abnormality that has a substantially limiting effect upon the ability to perform the job.³

In contrast to the ADA, Washington law does not inquire whether the impairment substantially limits a major life function. The Washington definition of disability is much broader than the ADA’s definition and covers medical conditions that are temporary or of short duration.

II. Americans with Disabilities Act (“ADA”)

The ADA, 42 U.S.C. § 12101 *et seq.*, in Title I prohibits discrimination on the basis of disability in employment. Over 43 million Americans have one or more physical or mental disabilities. Employers with 15 or more employees, governmental agencies and labor associations are prohibited from discriminating against a qualified individual with a disability based on their disability and are required to provide “reasonable accommodations” to permit the disabled to work and advance in careers.

Employers covered by the ADA may not “discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring or discharge of employees, employee compensation, advancement, job training, and other terms, conditions and privileges of employment.”

The ADA is intended to protect both disabled applicants and employees from unlawful discrimination. Unlike other anti-discrimination laws, where it is relatively easy to determine whether an individual is part of a protected class, such as age, gender, race or religion, determining coverage under the ADA has proven to be a complicated task. Applicants or employees are covered by the ADA if they are qualified individuals with a disability, meaning they can show that: (1) their circumstances satisfy one of three definitions of disability; and (2) they are qualified to perform the job with or without reasonable accommodation. The ADA does not require employers to hire or retain individuals who are not qualified to perform a job.

The ADA defines an individual with a disability as an individual who:

1. has a physical or mental impairment that substantially limits one or more of his/her major life activities;
2. has a record of such an impairment; or
3. is regarded as having such an impairment.

42 U.S.C. § 12102(2).

² *Doe v. Boeing*, 121 Wn.2d 8, 846 P.2d 531 (1993).

³ *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000).



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III. Family Medical Leave Act “FMLA”

The Family Medical Leave Act (“FMLA”) allows 12 weeks of protected time off for employees with a serious health condition, family member’s serious health condition, parental leave, or service members under a qualifying exigency leave (26 weeks). The FMLA covers employers of 50 or more employees in the United States, and all employees are counted including full-time, part-time, seasonal and temporary. However, the employee must have worked for the last 12 months a minimum of 1250 hours. In addition, there are certain requirements regarding the location of 50 employees within 75 miles of each other. Employees may take leave for their own serious health condition, a family member’s serious health condition, parental leave, or if a family member is called to active duty (qualifying exigency or injured on active duty). The FMLA exception is that it can be increased to 26 weeks of leave to care for family members injured while on active military duty, including up to 12 weeks for any qualifying exigency related to a family member called to active duty.

IV. Workers’ Compensation as it Relates to FMLA

The definition of a “serious health condition” under the FMLA and the qualifications for time loss under the Washington Industrial Insurance Act (workers’ compensation) are congruent. In order to get time loss, an injured worker must be absent from the job three days or more because of the industrial injury and have a doctor certify the industrial injury is the cause of the absence. Under the FMLA, the definition of a “serious health condition” is one which causes the worker to be absent for more than three days and for which the worker is under the care of a physician. Therefore, when a worker is out on workers’ compensation and is out for three days or more, an employer should automatically put them on FMLA leave. The Department of Labor’s final FMLA regulations allow for this piggybacking FMLA and workers’ compensation time loss.

V. FMLA, ADA and Washington Law on Disabilities

The definition of a serious illness under the FMLA may or may not be congruent with the ADA’s definition of a disability. The ADA defines a disability as a physical, mental or sensory impairment which significantly affects a major life activity. If the worker is on FMLA leave for his/her own serious illness, rather than that of a family member, the worker’s medical condition, its permanency and its effect on major life activities will determine if it is a disability under the ADA. For example, a worker who is on FMLA leave because she has had a hysterectomy would probably not be a person with a disability under the ADA. She does have a condition which affects a major life activity, reproduction, but it has no effect on her ability to perform the essential functions of her job in the future and it is not an “impairment.” She merely is recovering from a surgery. However, if the worker is on FMLA leave because she has breast cancer, her ability to perform the essential functions of her job in the future may be affected, depending on her job and her future treatment and prognosis.

Regardless of whether the worker’s serious health condition meets the ADA definition of a disability, the FMLA states that a worker does not have to return from FMLA leave, assuming he/she has some of the 12 weeks left, until he/she can perform all of the essential functions of his/her job. The FMLA leaves out the fundamental ADA qualification of “with or without accommodation,” which could place the employer in a difficult situation under the FMLA if it tries to get the worker back to work with an accommodation. However, the employer is in just as much trouble under the ADA if it does not offer a reasonable accommodation! Recent case law indicates an employer must go through the ADA analysis even if it is a futile exercise.



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Washington law defines a person with a disability much more broadly than the ADA. In Washington, a person has a disability if he/she has a medical condition which is abnormal and diagnosable. Every worker on FMLA leave for his/her own serious health condition qualifies as a person with a disability, since he/she must have an abnormal, diagnosable condition in order to receive FMLA leave. He/she is entitled to full time or intermittent FMLA leave and also entitled to accommodation for the aspects of his/her illness which affects the ability to perform the essential functions of his/her job.

Because of the confidentiality requirements of health information under both the FMLA and the ADA, all such information should be kept under lock and key separate from the employee's personnel file. All health information, whether workers' compensation related or FMLA/ADA related, should be kept in the worker's confidential health file and reviewed only by those who need to know. Supervisors who are not involved in FMLA decisions should not have access to the files and should have only limited access when the company needs to make an accommodation.

VI. The ADA, Workers' Compensation and Washington Law

The Equal Employment Opportunity Commission statistics showed that the two largest areas of ADA complaints were discharge and failure to accommodate. The cases filed by impairment, include back impairment, neurological impairment, psychological impairment, extremities, heart impairment and substance abuse. The first two categories of impairment are those common to workers' compensation, back and neurological problems, which includes repetitive motion problems.

Under Washington law, every worker who is out on workers' compensation "time loss" is a person with a disability since he/she has a condition which is diagnosable and abnormal. Therefore, the worker is entitled to accommodation.

The tension between the ADA, the Washington law regarding persons with disabilities and workers' compensation arises from the employer's desire to cut workers' compensation costs by bringing the worker back as soon as possible to a modified duty/return to work position and the worker's expectation that the modified duty/return to work position is something he/she can do for the rest of his/her employment.

Employees who fail to accommodate work-related injuries are at substantial risk in a failure to accommodate suit under either the ADA or the Washington law protecting those with disabilities.

Conclusion

Employers who maintain well-documented records and who consider each case with care and deliberation will be able to navigate the laws and minimize risk. The attached brief summaries will also assist employers who encounter these issues. Understanding the differences and nuances of these overlapping employee leave laws will unravel any and all confusion for you and your business.

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Americans with Disabilities Act (ADA)	Washington Law Against Discrimination (WLAD)	Family Medical Leave Act (FMLA)/Washington Family Leave Act (WFLA)	Washington Family Care Act (WFCA)	Pregnancy Disability Leave (PDL)	Washington Military Family Leave Act (WMFLA)	Domestic Violence Leave
15 or more Employees	8 or more Employees	50 or more Employees	n/a	8 or more Employees	n/a	n/a
<p>ADA Definition of Disability: A physical or mental impairment that substantially affects one or more major life activities</p> <p>ADA Definition of Major Life Activity: [i]ncludes “the operation of a major bodily function” which includes, among other functions and systems, the following: immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.</p> <p>ADA Definition of Qualified Individual with a disability: A person who can perform the essential functions of the job with or without Reasonable Accommodation</p> <p>Exception: “undue hardship” “direct threat to safety”</p>	<p>WLAD Definition of Disability: a) “Disability” means the presence of a sensory, mental, or physical impairment that: (i) Is medically cognizable or diagnosable; or (ii) Exists as a record or history; or (iii) Is perceived to exist whether or not it exists in fact.</p> <p>b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.</p>	<p>Leave Period: 12 weeks</p> <p>Circumstances</p> <ol style="list-style-type: none"> Employee’s serious health condition (including pregnancy disability) Serious Health Center of a Family Member Parental Leave “Qualifying Exigency” which relates to military leave. Active duty all up (FMLA only) Care for a family member or next of kin injured or ill as a result of active military leave (FMLA only – Note: 26 weeks a year) 	<p>Eligible Employees may use paid time off to care for a sick family member</p> <ol style="list-style-type: none"> Children younger than 18 with health conditions that require treatment or supervisor, Adult children incapable of self care because of mental or physical disability, and Spouse, parent, parent-in-law, or grandparent who has a serious health center or an emergency condition 	<p>Protected leave for entire duration of incapacity due to pregnancy or childbirth</p>	<p>Eligible Employees: those who work an average of 20 or more hours per week</p> <p>ALL Employees (no minors # of Employees)</p> <p>15 days of unpaid leave per “military deployment of a spouse”</p> <p>15 days run separately for WFLA but concurrently with FMLA “qualifying exigency” leave</p> <hr/> <p>Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)</p> <p>Prohibits discrimination</p> <p>No minimum number of employees</p>	<p>Eligible Employee: one who is a victim of domestic violence, sexual assault or stalking / <u>or</u> Employees who are family members of such victims.</p> <p>Purpose – to address legal financial and health care needs</p> <p><u>No</u> minimum required hours worked</p>