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THE THREE HEADED MONSTER:
ADA/FMLA/WORKERS' COMPENSATION

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I. INTRODUCTION.

Even the most savvy of human resource professionals, general counsel, and private legal practitioners are apprehensive when it comes to dealing with what has been not-so-affectionately labeled as the "three headed monster," the overlap of the Americans with Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA"), and state workers' compensation laws. The overlap between these three areas of law affects a host of personnel management issues, including medical inquiries, employee illnesses and medical conditions, and requests for leave.[1] While the task of applying these three different sets of laws and regulations may seem daunting, it is one that can and should be mastered.

The importance of understanding the dual and triple coverage of these laws to employee injury, accommodation, and leave issues cannot be emphasized enough. Managers, supervisors, and human resource representatives face *personal liability* under the FMLA. Additionally, in light of recent Supreme Court case law limiting the scope of the definition of who is disabled under the ADA by allowing employers to consider the effect of mitigating measures, the EEOC in July 1999 instructed its investigators to consider employees' workers compensation records when evaluating charges of disability discrimination under the seldom used "record of impairment" prong of the ADA. New EEOC guidelines have also been issued to assist its investigators in focusing more on the "regarded as disabled" prong of the ADA. Thus, how employers and/or their workers' compensation third party administrators or private carriers conduct medical inquiries will take on new importance. Indeed, the modern day system of managing workers' compensation claims through third party administrators, private carriers, and corporate risk management departments,

[1]Indeed, this three headed monster grows a fourth head when it is applied to situations in a unionized workplace as some actions taken to implement the FMLA, ADA, and workers' compensation laws impact the National Labor Relations Act and an employer's obligations under collective bargaining agreements ("CBA").

which often are not in frequent communication with the company's human resource and labor relations personnel, creates the potential for serious mistakes and legal liability. Many larger companies such as Texas Instruments and Aetna have realized the danger of such fragmented systems and have taken steps to centralize review of workplace injuries, requests for accommodations, requests for leaves, and employee discipline. The attorneys at Kamer & Zucker, as well as national legal commentators, have observed that the biggest mistakes are made when a company's workers' compensation, ADA, and FMLA decision makers are not coordinating their efforts.

When confronting the three headed monster, you must start by first applying each of the laws separately to the facts at hand. While it is human nature to immediately focus on the particular leave, accommodation, or injury/illness at issue, if you do not methodically apply each set of laws to the facts first, the risk of failing to address overlapping legal obligations under the ADA, FMLA, and workers' compensation dramatically increases and exposes the company to substantial legal liability, including individual liability in the case of the FMLA. As with many other aspects of managing a workforce, creating the proverbial "paper trail" is essential to show that you have analyzed the requirements of each law separately. If your company's leave, accommodation, employee discipline, and workers' compensation decision makers are scattered in different departments or located outside of the company, whether at corporate headquarters or a third-party administrator's office, and centralization is not an option, a performance and review plan to ensure that all such issues are examined under the ADA, FMLA, and workers' compensation is vital.

Almost as important as a company's human resource staff's understanding of the company's legal obligations under the ADA, FMLA, and workers' compensation is making sure the company's

managers and supervisors understand at least the core concepts of these laws, including the legal liability associated with taking actions or allowing conditions to develop that would constitute retaliation or harassment actionable under the ADA, FMLA, and state tort law. Unfortunately, many managers do not understand these issues and often are unwilling to take the time to learn about these laws. While almost every company today offers some sort of sexual harassment prevention and investigation training to its mangers, few explore the subjects of workers' compensation, the ADA, and the FMLA.

The materials below are designed to provide you with a general reference tool to utilize when determining how to approach an employee's medical condition. The first section provides an overview of the requirements of the FMLA, the ADA, and workers' compensation laws. The second section addresses the interplay between this three headed monster.[2] The final section addresses the potential fourth head - the National Labor Relations Act.

II. THE THREE STATUTES.

A. Family and Medical Leave Act of 1993.

The Family and Medical Leave Act ("FMLA") became effective on August 5, 1993. It was enacted due to Congress' recognition of a correlation between stability in the family and productivity in the workplace. Congress determined that parents should be able to have time to participate in early child-rearing and to attend to serious illnesses affecting themselves and their immediate family,

[2]The following sources were consulted: Jules L. Smith, At the Crossroads of the FMLA, the ADA and Workers' Compensation: Issues and Answers about Employee Leaves of Absences, T98ELAB ABA-LGLED 31 (1998); Walter E. Zink, II and Jill G. Schroeder, Evaluating the Interplay Among FMLA, ADA, and Workers' Comp. Statutes Isn't Child's Play, 66 Def. Couns. J. 79 (1999); Jana H. Carey & Thomas H. Strong, At the Crossroads of the FMLA, ADA, and Workers' Compensation: Issues and Answers about Employee Leaves of Absences, T98ELAB ABA-LGLED 1 (1998); Pamela L. Hemminger, Leaves of Absences: Tough Issues and Current Developments Under FMLA/CFRA/POLL/ADA and Workers' Compensation, 592 PLI/LH 653 (1998).

especially given the significant increase in single-parent households and homes where both parents are working. With the passage of the FMLA, the United States has joined the one hundred thirty-five (135) other countries which provide some form of family or medical leave.

2. Coverage.

‘ Employer: Private employers with 50 or more employees within a 75-mile radius of employer's work site for 20 or more work weeks; state and local government employers without regard to number of employees.

‘ Employee: All persons maintained on payroll, including part-time employees and employees on paid or unpaid leave or disciplinary suspension, who have been employed for at least 12 months (nonconsecutive is acceptable) and have worked at least 1,250 hours in the 12-month period immediately preceding the request for leave. The definition of "hours worked" is interpreted the same as it is under the Fair Labor Standards Act. Vacation or leave does not count as hours worked. Employers can also share joint FMLA obligations with temporary employment agencies to temporary employees if the temporary employee's time with the temporary agency meets the statutory thresholds. See 29 C.F.R. § 825.106(e); Salgado v. CDW Computers Ctrs., Inc., No. 97C1975, 1998 WL 60779 (N.D. Ill. Feb. 5, 1998).

2. Benefit/Entitlement.

‘ Twelve (12) weeks of unpaid leave with group health benefits and guarantee of returning to the same job or substantially the same job, except those in "key" positions.

3. Reasons for Leave and Definitions.

‘ Birth of a baby or to care for a newborn; applies to mothers and fathers;

‘ Care for an adoptive child or foster care child placed with employee; applies to mothers and fathers;

‘ Care for employee's spouse, child or parent with a serious health condition, including caring for basic medical, hygienic or nutritional needs, transportation, and providing psychological comfort;

‘ Serious health condition suffered by employee that renders employee unable to perform the functions of his/her job. **Serious health condition** is defined

as an illness, injury, impairment or condition that involves:

- Inpatient care in a hospital, hospice, residential medical care facility, including any period of **incapacity** (inability to work, attend school or perform other regular daily activities) or any subsequent treatment in connection with such impairment; or

- **"Continuing treatment"** by a health care provider when there is a:

  < Period of incapacity requiring an **absence of more than three consecutive days** from work, and any subsequent treatment or period of incapacity relating to the same condition[3] that also involves:

    , treatment on two or more times by a health care provider; or

    , treatment by a health care provider on at least one occasion which results in a regimen of continued treatment under the supervision of the health care provider.

  < Period of incapacity due to **pregnancy** or for prenatal care; or

  < Any period of incapacity or treatment for such incapacity due to a **chronic** serious health condition (*e.g.*, asthma, diabetes, epilepsy) that:

    , requires periodic treatment by a health care provider;

    , continues over an extended period of time (including recurring episodes of a single underlying condition); and

    , may cause episodic rather than a continued period of incapacity.

[3]The Seventh Circuit Court of Appeals recently ruled that a group of lesser, unrelated medical conditions could be a qualifying reason for FMLA leave when considered together. Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997) (finding that an employee with high blood pressure, hyperthyroidism, back pain, severe headaches, sinusitis, infected cyst, sore throat, swelling throat, coughing, stress, and depression may have been suffering from a serious health condition under the FMLA even though each ailment separately may not have been sufficient to invoke the Act).

< Period of incapacity that is **permanent or long-term** due to a condition for which treatment may not be effective (Alzheimers, a severe stroke, or terminal stages of a disease); or

< Any period of absence to receive **multiple treatments** (including any period of recovery therefrom) by a health care provider, or on referral of a health care provider, either for **restorative** surgery after an accident or injury, or for a condition that would likely result in a period of incapacity of more than three consecutive days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

P *(In our mock trial, Mr. Monet was arguably covered by the FMLA as he was seeking continuing treatment from Dr. Doolittle and was absent from work for more than three days).*

P Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. It does not include routine physicals, eye examinations, or dental examinations. A regimen of continuing treatment can include a course of prescriptive medications or therapy requiring special equipment. A regimen of treatment that includes over-the-counter medications, bed rest and drinking fluids, that can be initiated without a visit to a health care provider is not, by itself, sufficient to constitute a regimen of continuing treatment.

P Cosmetic treatments are not serious health conditions unless inpatient hospital care is required or complications develop.

P Substance abuse may be a serious health condition if the conditions above are met. Absences due to use, rather than treatment, however, are not covered.

4. <u>Medical Certification/Information</u>.

‘ **Medical Certification-Limited Information Only**.

‘ The FMLA regulations do not allow for employers to make direct contact with employees' health care providers. To verify an employee's serious health condition, an employer can request a

medical certification which can only contain the following information:

- the date when the serious health condition commenced;
- the probable duration of the serious health condition;
- appropriate medical facts regarding the condition; and
- that the employee is needed to care for his/her spouse, child, parent, or an estimate of time needed to care for the family member, or that the employee is unable to perform the functions of his/her position.[4]

‘ If intermittent leave is required for planned medical treatment, the medical certification must also state:

- dates and probable duration of medical treatments; and
- that such treatment is medically necessary; or
- that the employee is needed to care for a spouse, child, or parent.

‘ An employee's failure to provide employer with certification can result in lost entitlement to FMLA rights.

‘ If an employee presents an incomplete medical certification, the employer should notify the employee of the defects and give the employee a chance to cure the deficiencies.

‘ If an employee presents a complete certification, an employer cannot request more information. However, the FMLA regulations allow the employer's health care provider to contact the employee's health care provider, only after obtaining the employee's permission, to clarify any issues and to authenticate the medical certification.

‘ **Second Opinions.**

‘ Employer can request a second opinion at its own expense for an employee's or family member's serious health condition, but the

[4]The Department of Labor has developed a model certification form, WH-380, which can be downloaded from its website: www.dol.gov.

physician who gives the second opinion cannot be employed on a regular basis by the employer.

- If the second opinion conflicts with the original certification, employer may require, at its expense, that employee obtain the opinion of a third health care provider approved jointly by employee and employer; this opinion is final and binding.

- **Return to Work Certification.**

  - Fitness for Duty Reports may be requested if leave is taken due to employee's own serious health condition, such reports are uniformly required from all employees in similar situations, and the employee was notified when his leave began that such a report would be necessary.

  - Failure to provide a return-to-work certificate can result in the denial of reinstatement and termination.

5. Duration and Types of Leave.

- **Duration.**

  - 12 full workweeks of leave in any twelve-month period.

  - Employer can choose calendar year, fixed 12-month period, or rolling 12-month period but must designate which it is using in advance or the time period which is most favorable to the employee will be applied.

  - Employer can change the method of calculation, but must give 60-days' notice.

  - Exceptions to 12-week entitlement: If employer employs husband and wife, any leave for the care of a newborn, or sick child or parent is 12 weeks total for both employees.

- **Intermittent and Reduced Leave.**

  - Intermittent leave is only permitted for an employee's serious health condition or to care for a spouse, child or parent with a serious health condition, when it is medically necessary. It is not permitted for the

birth of a newborn or care for an adoptive/foster child.

‘ If employee requests intermittent or reduced leave that is foreseeable based upon planned medical treatment, employer may require employee to transfer temporarily to an alternative position with equivalent pay and group health benefits and which better accommodates the required leave.

‘ A reduced leave schedule is a schedule which reduces an employee's hours by workweek or workday.

6. <u>Notice Obligations</u>.

‘ **Employer's Obligation to Employees.**

‘ Employer must post a notice that explains the FMLA; failure to do so can result in civil fines and penalties.

‘ If employer has written guidance to employees concerning benefits and leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA <u>must</u> be included in that handbook or other document. 29 C.F.R. § 825.301(a)(1). *(In our mock trial scenario, Super Bull's-Eye had an employee handbook with employee benefits and leave information, but the handbook did not contain the proper FMLA information.)*

‘ If employer does not have written polices, manuals, or handbooks describing employee benefits or leave provisions, the employer shall provide written guidance to an employee concerning all of the employee's rights and obligations under the FMLA, which can consist of the FMLA Fact Sheet available on-line and at the Department of Labor's local Wage and Hour offices, *in addition to* the standard posting discussed above. 29 C.F.R. § 825.301(a)(1), (b).

‘ Upon an employee's request for leave, employer must designate the leave as FMLA and provide written notice of the following, <u>in a language in which the employee is literate</u>:

- whether leave is being counted as 12 weeks of FMLA leave;
- if applicable, any medical certification requirements;

- the employer's requirements, if any, of substituting paid leave or employee's right to elect paid leave;

- the employee's payments, if any, for continuing health and other benefits during leave;

- whether a fitness for duty report will be required to return to work;

- whether he is a key employee and the import of that designation; and

- the right to return to the same or equivalent job. 29 C.F.R. § 825.301(b)(1).

‘ This notice must be given no less than the first time in each six (6) months that an employee gives notice of the need for FMLA leave. However, it is recommended that this notice be given every time leave is requested unless an employer is handling an intermittent leave issue.

‘ Designation of leave as FMLA leave usually must be made within two business days (absent extenuating circumstances). When in doubt, employers can provisionally designate leave as FMLA leave and await receipt of medical certification. Oral notice within two business days is sufficient but it must be confirmed in writing by next payday. *(In our mock trial scenario, Super Bull's-Eye's Workers' Compensation Department or its Human Resource Department should have, as soon as they learned of Mr. Monet's potentially serious health condition, designated Mr. Monet's leave as FMLA leave, provided the requisite notices, and required an FMLA medical certification.)*

‘ **Employee's Obligation.**

‘ Foreseeable leave: Employee must give 30 days' notice (not to be rigidly applied) for birth, placement of a child, or planned medical treatment for serious health condition of employee or family member. When leave is based upon planned medical treatment, the employee is required to make reasonable efforts to schedule treatment so as not to disrupt employer's operations.

- Unforeseeable leave: Employee should notice employer as soon as possible.

- Type of notice required: Employee must give at least verbal notice sufficient to make the employer aware that he needs FMLA-qualifying leave. The employee does not have to mention FMLA and the employer has an obligation to inquire and obtain information. *(In our mock trial, Mr. Monet's supervisor should have inquired further into Mr. Monet's illness when he told her, "the doctor thinks there is something wrong with my lungs" and "I may have a lung disease," especially given his attendance problem and her knowledge of his treatment by a physician. Human Resources should have inquired into Mr. Monet's illness when it received reports from the Workers' Compensation office regarding Dr. Doolittle's findings. Indeed, Super Bull's-Eye was arguably on notice of the need for FMLA leave when its Workers' Compensation office received Dr. Doolittle's findings.)*

7. Employment and Benefits Protection.

- **Job Restoration.**

  - An employee who takes FMLA leave is entitled, upon returning from leave, to be restored to the position held by the employee when the leave commenced or to an equivalent position with equivalent benefits, pay, terms and other conditions of employment. However, employees on leave are not entitled to accrue seniority and other benefits.

  - Key Employee Exception: a highly compensated employee can be denied restoration of employment if necessary to prevent substantial and grievous economic injury to the employer and the employer notifies the employee of this intent before the leave begins. A key employee is a salaried employee who is among the highest 10 percent (10%) paid of all employees.

- **Health Insurance Coverage.**

  - Employer must maintain the employee's coverage under any group health plan at the same level and under the same conditions as would have been provided if the employee had continued in employment.

  - Employer is obligated to continue paying the same portion of premiums it paid during active employment, which may include

health and welfare contributions depending upon collective bargaining agreements.

- If a plan or benefit is added during the leave, the employee is entitled to the benefit as if he was not on leave. In addition, the employee on leave must be given notice of opportunities to change plans or benefits.

- Employee is obligated to continue paying the portion of the premiums paid by the employee during active employment. If an employee fails to continue health coverage while on leave, he must be permitted to reinstate coverage upon returning from leave on the same terms as existed prior to the leave. No waiting period, physical examination, or pre-existing condition clause may be imposed.

- Before coverage may be dropped due to an employee's failure to make his payments while on leave, he must be given written notice at least 15 days before coverage ceases.

- **Other Benefits.**

  - An employee is entitled to any right, benefit or position that he would have been entitled to had he <u>not</u> taken leave.

  - An employee on FMLA leave may not lose any employment benefit accrued prior to the beginning of the leave. This includes some salary increases, group life insurance, disability insurance, sick leave, annual leave, and pensions. It is recommended that employers construe "benefit" broadly to include benefits such as shift bids and other less obvious benefits.

  - Upon returning from leave, the employee must not be required to re-qualify for any benefits he had before exercising leave.

  - With regard to pension and other retirement plans, a period of FMLA leave must be considered continued service for vesting and eligibility.

  - Employees on leave are entitled to any changes in benefits made during the leave immediately upon returning from leave, with the exception of changes in benefits that depend upon seniority or accrual of benefits during the leave period.

8. Prohibited Acts.

- It is unlawful for any employer to restrain, or deny the exercise of or the attempt to exercise, any right provided under the FMLA.

- It is unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by the FMLA.

- It is unlawful to discharge or in any other manner discriminate against any individual because he (1) has filed a charge, instituted or cause to be instituted any proceeding under or related to the FMLA; (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided by the FMLA; or (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided by the FMLA.

9. Liability.

- An employer is liable for damages equal to the amount of wages, salary, and employment benefits lost or denied because of any violation, as well as actual monetary losses suffered, interest, and/or liquidated damages.

- Actions must be commenced within 2 years of the alleged violation or three years if the violation was willful.

- Supervisors can be personally liable for violations of the FMLA when acting in the employer's interest.

10. Collective Bargaining Agreements.

- Nothing in the FMLA diminishes the obligation of an employer to comply with a CBA or any other employment benefit program/plan that provides greater rights than the Act.

- Conversely, a CBA cannot diminish employees' FMLA rights.

B. Americans with Disabilities Act of 1990.

Through the enactment of the Americans with Disabilities Act of 1990, Congress declared that the nation's goals with regard to individuals with disabilities are to ensure equal opportunities, independence, and full participation. The ADA is perhaps the most far-reaching civil rights

legislation since the Civil Rights Act of 1964. The ADA was passed to address what many believe to be severe prejudices and discrimination against individuals with disabilities. Indeed, disability rights advocates have compared the segregation and bigotry against individuals with disabilities with the segregation and bigotry that spurned the former "Jim Crow" laws.

1. Coverage.

‘ Employer: Private employers with 15 or more employees and all state and local governments without regard to number of employees.

‘ Employee: Qualified individual with a disability who can perform the essential functions of the job with or without a reasonable accommodation, including applicants and individuals who have a relationship with someone who has a disability.

‘ Definition of a Disability: Individual who: (a) suffers from a physical or mental impairment that substantially limits one or more major life activities; or (b) has a record of such impairment; or (c) is regarded as having such an impairment.

‘ Key elements of the definition of one who suffers from a physical or mental **impairment** that **substantially limits one or more major life activities.**

‘ **Impairment** is defined as:

- a physical impairment is any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic, lymphatic, skin, and endocrine;

- a mental impairment is any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

P temporary or non-chronic impairments of a short duration do not constitute a disability, such as appendicitis, concussions,

sprains, or broken limbs;

- P individuals who are engaged in or have completed drug rehabilitation and who are no longer using drugs are protected;

- P alcoholism is an impairment;

- P AIDS or HIV-positive is an impairment;

- P mitigating measures - Consider mitigating measures such as medication or devices such as hearing aides, glasses, etc., when determining whether an individual is impaired.

‘ **Major life activity** is defined as: those basic activities an average person can perform with little or no difficulty, including but not limited to taking care of one's self, walking, speaking, hearing, breathing, learning, working, reproducing, thinking, concentrating, and interacting with others.

‘ **Substantially limited** is defined as:

- significantly restricted in the condition, manner or duration of which the individual can perform a major life activity as compared to an average person. Consider the:

  - < nature and severity of the impairment;

  - < the duration or expected duration of the impairment; and

  - < the permanent or long-term impact or expected impact of the impairment.

- P with regard to the major life activity of working, substantially limited means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to an average person with comparable training, skills, and ability. Based on recent Supreme Court cases, employers can properly consider the effect of any mitigating measures such as medications or prosthesis. *(In our mock trial, Mr. Monet presented as being unable to work in a broad range of jobs as he was unable to interact with people and chemicals.)*

‘ "Record of a disability" encompasses a person who has a history of a mental

or physical impairment that substantially limits one or more major life activities. For example, a person who has recovered from cancer, mental illness, or heart disease, may have a record of a disability.

‘ "Regarded as having a disability" encompasses a person who has an impairment, physical or mental, that does not substantially limit one or more major life activities, yet an employer treats the employee as substantially limited - *e.g.*, a person with severe facial disfigurement, loss of a limb, or obesity.

2. Benefit/Entitlement.

‘ Title I of the ADA provides protection from discrimination and certain disability-related inquiries for employees, applicants and individuals that have relationships with disabled persons. In addition, Title I requires reasonable accommodations for individuals who are disabled as set forth above.

‘ The ADA protects qualified individuals with disabilities - an individual with a disability who, with or without **reasonable accommodation**, can perform the **essential functions** of the employment position that such individual holds or desires. The key elements and definitions follow:

‘ **Essential Functions** are the primary job duties that are fundamental to the employment position. A job function may be essential for several reasons, including but not limited to: the function may be essential because the reason the position exists is to perform that function; the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or the function may be highly specialized so that the incumbent in the position is hired for his/her expertise or ability to perform the particular function. Consider:

- the employer's judgment as to what is essential;
- written job descriptions prepared before advertising or interviewing;
- the amount of time spent performing that function;
- the terms of any collective bargaining agreement; and

- the work experience of current and past employees in the same position.

‘ With or without a **reasonable accommodation**: Failure to make a reasonable accommodation to the known disabilities of an otherwise qualified employee or applicant constitutes unlawful discrimination unless the employer can demonstrate that the accommodation issued imposes an **undue hardship** on the employer's business.

- An employee must at least notify his employer that he suffers from a medical condition and needs some type of change to his work situation to invoke the ADA's reasonable accommodation requirements.

- To determine the appropriate reasonable accommodation, it is necessary for the employer to initiate an informal, interactive process with the employee to identify the precise limitations resulting from the disability and what would overcome those limitations.

- Reasonable accommodations are:

  < modifications or adjustments to a job applicant process that would enable a qualified individual with a disability to be considered for available positions;

  < modifications or adjustments to work environment that would enable a qualified individual with a disability to perform the essential functions of the position;

  < modifications or adjustments that would enable an employee with a disability to enjoy equal benefits and privileges of employment;

  < examples: reassignments to vacant positions; modification of work schedules, including leave; making facility accessible and usable; job restructuring; acquisition or modification of equipment or devices; supplying readers or interpreters.

- Employer does not have to restructure a job if the restructuring would eliminate an essential, as opposed to a marginal, function of the position. *(In our mock trial, for example, assuming that the stock clerk's function of cleaning shelves was essential, this job need not be restructured to suit Mr. Monet while the available warehouse job <u>could</u> have been restructured to be performed at home.)*

P Employer does not have to violate a bona fide seniority system at the expense of other employees' rights under a collective bargaining agreement.

< An accommodation that imposes an **undue hardship** need not be made. Undue hardship is an action requiring significant difficulty or expense to be incurred by the employer. Consider:

< the nature and cost of accommodation;

< the overall financial resources of the facility;

< the number of persons employed, effect on expenses and resources;

< overall financial resources of employer, its size of business, and number and type and location of its facilities;

< type of business, including composition, structure and functions of work force;

< do <u>not</u> consider effect on morale of other employees, although heavier work load on other employees <u>is</u> relevant;

< no reasonable accommodation is needed if employee poses a direct threat to health or safety of others or property.

3. <u>Medical Inquiries, Exams, and Certifications</u>.

- **Pre-Offer Exams and Inquiries.**

  - Unlawful to require an applicant to undergo a medical exam pre-offer.

  - Unlawful to inquire into an applicant's medical history or worker's compensation history.

  - Only acceptable to determine whether applicant can perform the essential functions of the job.

  - Can ask about illegal drug and alcohol use but cannot ask whether applicant is an alcoholic or an addict.

  - Testing for drugs pre-offer is not a medical exam and is allowed.

- **Post-Offer.**

  - May require an applicant to undergo a medical exam if all entering employees must undergo exam.

  - May inquire about applicant's workers' compensation history and past injuries with respect to applicant's ability to perform the essential functions of the job.

  - Can inquire and require exams when employee returns to work or there is a need to determine whether an employee can still perform essential functions. Inquiry must be related to job performance.

  - May inquire when addressing an accommodation request to determine if the individual's medical condition meets the ADA definition of "disability," and if so, what effective accommodations will allow the employee to perform the essential elements of the employee's job. When an employee's disability and/or the need for accommodation is not obvious, the employer may ask the employee for reasonable documentation about his/her disability and functional limitations. If an individual's disability or need for reasonable accommodation is not obvious, and he refuses to provide the reasonable documentation requested by the employer, then he is not entitled to a reasonable accommodation.

4. Confidentiality.

- Any information gathered from post-offer inquiries or exams must be kept separately from employee's personnel file and treated as confidential.

- Information concerning a disability may only be shared with those who need to know, *i.e.*, supervisor, first-aid personnel.

5. <u>Prohibited Acts</u>.

- It is unlawful for an employer to discriminate against a qualified individual with a disability in regard to recruitment, application, hiring, termination, promotions, rates of pay, assignments, leaves of absence, fringe benefits, or any other term, condition, or privilege of employment.

- It is unlawful for an employer to discriminate against a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social, or other relationship or association.

- It is unlawful for an employer to not make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability.

- It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by the ADA or because that individual made a charge, testified, assisted with, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision of the ADA.

- It is unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise of any right protected or granted by the ADA.

6. <u>Liability</u>.

- The ADA adopts the remedies of Title VII.

- Compensatory and punitive damages are recoverable for violations of the reasonable accommodation requirement and/or for intentional discrimination.

- Statutory limits for compensatory and punitive damages are:

  - 15-100 employees, maximum of $50,000;

- 101-200 employees, maximum of $100,000;
- 201-300 employees, maximum of $200,000;
- Over 300 employees, maximum of $300,000.

- Hiring, reinstatement, and injunctive relief is also available.

C. Workers' Compensation.

The original Nevada Industrial Insurance Act was enacted in 1913. It evolved out of the public's demand for a better system of remedying workplace injuries than that offered through the court system. Since 1913, "workers' compensation" has been the sole remedy where an employee sustains an injury as a result of an accident which arose out of and in the course of his employment. The modern day version of the Nevada Industrial Insurance Act also provides workers' compensation for occupational diseases in addition to on-the-job accidents. In Nevada, as of January 1, 2000, workers' compensation coverage can be provided through private carrier, a self-insured employer program, or an association of self-insured employers program.[5]

1. **Coverage.**

- Employers: With few exceptions, Nevada is a mandatory workers' compensation coverage state and any person or entity that uses the services of another must have a current workers' compensation policy. Also, except as provided for in NRS 616B.603, subcontractors and independent contractors are deemed to be employees of the principal contractor (the entity contracting for the work) for the purposes of workers' compensation coverage.[6]

[5]As of January 1, 2000, the Employers Insurance Company of Nevada ("EICON") (formerly SIIS) was privatized and is considered the same as any other private carrier.

[6]NRS 616B.603 provides a limited exception to the general rule that subcontractors and independent contractors are deemed to be employees of the principal contractor (the entity contracting for the work). If the principal contractor is not licensed pursuant to Chapter 624

(covering builders) or a real estate broker, a person or entity will not be deemed to be an employer for the purposes of workers' compensation coverage if he/it contracts with an "independent enterprise" that is not in the same business, profession, or occupation, and the "independent enterprise" holds a business or occupational license in his/its own name and owns, rents, or furnishes property used in furtherance of his/its business.

‘ Employees: Every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully, including aliens, minors, elected and appointed officials, members of boards of directors of quasi-public or private corporations while rendering services to such corporations for pay, and musicians providing music for hire.[7]

2. Benefit/Entitlement.

‘ Compensation for injuries and occupational diseases suffered by employees arising out of and in the course of employment, which consist of five basic forms: (1) temporary partial or temporary total disability benefits; (2) permanent partial or permanent total disability benefits; (3) vocational rehabilitation benefits; (4) medical or accident benefits; and (5) death benefits.[8]

3. Medical Inquiries.

‘ Pursuant to NRS 616D.330, an employer may communicate freely with examining or treating physicians or chiropractors concerning an injured employee's medical disposition as long as it maintains a written log of all verbal communications and copies written communications on the injured employee or the employee's representative.

4. Medical Examinations.

‘ Employers or their insurers may request that an injured employee submit to medical examinations as long as certain procedural steps are followed. See, e.g., NRS 616C.140, NAC 616C.1162 to NAC 616C.1168.

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[7]The Nevada Industrial Insurance Act excludes several very narrow classes of employees from the Act's coverage, including persons whose employment is casual and not in the course of trade, business, profession, or occupation of the employer, theatrical or stage performers in an exhibition; musicians when their services are for two days or less; persons engaged in household domestic service, farm, dairy, agricultural, or horticultural labor or in stock or poultry raising; voluntary ski patrollers, members of the clergy, rabbis, or lay readers at church services; and any real estate broker. The Act also adds a substantial number of unconventional worker classifications to the definition of employee. See NRS 616A.110 to NRS 616A.225.

[8]Injuries or diseases caused by stress are compensable if such conditions arose out of and in the course of an employee's employment, but any ailment or disorder caused by any gradual mental stimulus shall not be deemed to arise out of and in the course of employment. NRS 616C.180. However, in Roberts v. SIIS, 114 Nev. 364, 956 P.2d 790 (1998), the Nevada Supreme Court held that psychiatric disorders that develop from an industrial injury are not subject to the bar against recovery for disorders caused by "gradual mental stimulus."

5. Light/Modified Duty.

‘ Nevada employers can request that injured employees accept light-duty employment or employment that is modified to the limitations and restrictions imposed by a physician or chiropractor. If the injured employee refuses a valid light or modified duty position, the employee's temporary total disability payments can be terminated. Many employers have light or modified duty programs designed to keep injured employees accustomed to coming to work, as studies indicate the longer an injured employee is allowed to remain off work, the harder it is to get the employee back into the regular work force.[9]

6. Notice Requirements.

‘ Employers must post and maintain a notice in a conspicuous place identifying its industrial carrier's name, business address, and telephone number as well as the name, business address, and telephone number of the carrier's nearest adjuster in Nevada.

7. Liability.

[9]After a 1993 change to Nevada's workers' compensation laws, employers could mitigate lost time benefits during the healing period after an industrial injury by utilizing the services of injured employees in a modified duty capacity. The 1993 reform allowed employers to pay employees or modified (light) duty 80% of their average monthly wage. The 1999 legislature changed the law to require, ***effective January 1, 2000, that employers pay employees on modified (light) duty the same wage paid at the time of injury if the employee is returned to work in the same classification, or substantially the same wage if returned to a different job.***

‘ The Nevada Industrial Insurance Act provides for a comprehensive scheme of civil and criminal penalties for employers that fail to provide, secure, and maintain workers' compensation, fail to post and maintain notices, or who make false statements or representations, and fail to maintain all required paperwork.[10] Furthermore, if an employer fails to provide and secure workers' compensation, an injured employee or his dependents may bring a civil action against the employer for damages and can seek to attach the employer's property to secure payment. In such situations, the employer is stripped of affirmative defenses and faces a presumption of liability that the employer must overcome.

III. INTERRELATIONSHIP BETWEEN ADA, FMLA, AND WORKERS' COMPENSATION.

A. Coverage.

1. Employer.

‘ ADA: 15 or more employees and all state and local governments.

‘ FMLA: 50 or more employees within a 75 mile radius for 20 weeks and all state and local governments.

‘ Workers' Compensation: Virtually all employers.

‘ Thus, the only employers who are not covered by all three statutes are employers who do not employ 50 or more employees within a 75-mile radius.

2. Employees.

‘ ADA: Disabled employees and applicants, and individuals with a relationship with a disabled person.

‘ FMLA: Employees who have worked 12 months and 1,250 hours in the 12 month period preceding the leave request.

‘ Workers' Compensation: Virtually all employees.

3. Health Conditions.

[10]For a complete listing of all prohibited acts and penalties, see NRS 616D.010 through NRS 616D.440.

- ADA: Individual must be disabled as defined above. Disability may not be a serious health condition under the FMLA as it may not require continuing treatment. For example, hearing loss and blindness may be disabilities but are not serious health conditions.

- FMLA: Serious health condition as defined above. Chronic or episodic conditions such as asthma or epilepsy and conditions that require regular treatment, such as chemotherapy or kidney dialysis, are serious health conditions. Not all serious health conditions are disabilities. For example, pregnancy, broken limbs, and temporary back problems are not generally disabilities but may be considered serious health conditions because either the condition is not an impairment (pregnancy) or is not substantially limiting (broken limb). The FMLA requires leave to care for family members with serious medical conditions but ADA and workers' compensation protect only the employee. It is unlawful under the ADA to discriminate, however, against an employee because of the known disability of a family member or other relation.

- Workers' Compensation: Injuries and occupational diseases suffered by employees arising out of and in the course of employment. Injuries or diseases may also be serious health conditions and/or disabilities.

- Dual and Triple Coverage Conditions:

  - A condition that is a disability and a serious health condition may require an ADA reasonable accommodation and FMLA leave rights. *(In our mock trial, Mr. Monet's Multiple Chemical Sensitivity substantially limited his ability to work and likely constituted a serious health condition because he was seeking continuing treatment from his physician which caused him to miss more than three consecutive days of work.)*

  - A condition that is an industrial injury that requires at least three days off of work for an apparent FMLA purpose may be covered under both workers' compensation and FMLA. *(In our mock trial, when Mr. Monet suffered an industrial injury, his serious health condition was discovered, and it caused him to take three weeks off of work, in addition to the week during which he recovered from his industrial injury. This leave could have been designated as FMLA leave as soon as Super Bull's-Eye became aware of the serious health condition.)*

  - A condition that is an industrial injury that requires at least three days

off of work for an apparent FMLA purpose and which may be of a magnitude to substantially impair a major life activity may be covered under workers' compensation, FMLA, and ADA.

P If the FMLA is potentially involved in these scenarios, always give notice of FMLA rights and the fact that leave may be designated as FMLA leave, even if provisionally.

B. Medical Examination, Inquiries, and Confidentiality.

1. <u>Inquiries</u>.

‘ <u>ADA</u>: For post-offer employees who seek accommodations, an employer can seek information as to nature and extent of the disability if the inquiry is job-related and consistent with business necessity. Information can be obtained directly from the employees' health care providers, but employers should always seek employees' written authorization first. These inquiries assist employers in determining whether a medical condition meets the definition of "disability," whether an accommodation is truly needed, and what would be effective. An employer can inquire upon return to work to determine whether an employee can still perform the essential functions of his job. Employer must keep all information confidential and separate.

‘ <u>FMLA</u>: Under the FMLA regulations, an employer cannot make direct contact with an employee's health care provider. An employer can request medical certification of the need for leave, but only a very limited amount of information can be obtained. An employer can seek return to work certification. The FMLA does not have a confidentiality requirement, but employers should keep information in a separate, confidential file, nevertheless.

‘ <u>Workers' Compensation</u>: Employer can freely communicate with physicians as long as it logs verbal communications and copies written communications on injured employee or representative.

2. <u>Exams</u>.

‘ <u>ADA</u>: Post-offer exams are permitted if everyone is required to undergo an exam and exams may be performed by employer's physician. If an employee requests an accommodation, an exam can be performed to determine whether an accommodation is truly necessary and would be effective. Exams are also permitted upon return to work. Such exams under the ADA can be conducted by company's doctor.

‘ FMLA: Limits medical certifications and fitness to return to work certifications to the employee's health care provider. If an employer questions a medical certification, it can then obtain a second opinion from a physician designated by the employer but physician cannot be one regularly employed by the employer. Employer can also seek third opinion from a doctor approved by both the employer and employee but that opinion is final and binding upon both parties.

‘ Workers' Compensation: Employers may request that an injured employee submit to medical examinations to assess the extent of the employee's injuries.

3. Dual and Triple Coverage.

‘ As a practical matter, employers are most likely to encounter problems with the differing FMLA and ADA standards for medical inquiries and exams when they fail to consider an employee's FMLA rights. Often, employers will conduct an ADA analysis of an employee's condition and make demands on the employee's doctors for information only to ultimately conclude that the employee's condition is not a covered ADA disability. Forgetting that the FMLA's "serious health condition" threshold is much lower than the ADA's definition of a disability, unwary employers find themselves having exceeded the FMLA limits on medical exams and inquiries and facing a potential FMLA lawsuit. Employees are not required under the law to specifically state that they are seeking "FMLA leave" or an "ADA accommodation." Thus employers must understand when and how to apply these two differing standards.

‘ As between the ADA and workers' compensation, the ADA does not prohibit employers from asking disability-related questions or requiring medical examinations in order to ascertain its workers' compensation liability as long as the scope of such questions and examinations are limited in scope to the specific occupational injury and its impact on the individual. An employer cannot use the workers' compensation process as an opportunity to ask far ranging questions or to require unrelated medical examinations. Such activity can constitute disability-related harassment prohibited by the ADA.

‘ The EEOC has issued a guidance indicating that when employees request time off for a reason that is related, or possibly related, to both an FMLA serious health condition and an ADA disability, an employer can require both FMLA certification and make additional disability-related medical inquiries. However, this practice is not recommended in the general case where it is not clear whether a disability is at issue and the employee is simply requesting

leave. Alternatively, in a situation where an employee clearly qualifies under the ADA and FMLA, and has indicated an intention to return to work provided an accommodation is made, the employer can and should begin to work toward return to work solutions with an employee while he is on FMLA leave. However, prior to making medical inquiries and sending the employee for medical exams, beyond those allowed by the FMLA, employers should initiate the informal interactive process to assess exactly what the employee wants and may require. After initiating the interactive process, employers can then make the broader medical inquiries and request more extensive examinations provided the alleged condition and/or the need for accommodation is not already obvious.

‘ *(In our mock trial, the Workers' Compensation division obtained information from Dr. Doolittle on Mr. Monet's industrial injury. This is acceptable under workers' compensation. Dr. Doolittle's records arguably put Super Bull's-Eye on notice of a serious health condition, triggering the FMLA, and Super Bull's-Eye could have sought a limited certification from Dr. Doolittle had Mr. Monet requested leave. Thereafter, Mr. Monet disclosed his diagnosis of Multiple Chemical Sensitivity, triggering the ADA. Super Bull's-Eye sought a second opinion examination which is permitted under the ADA and FMLA; however, under the FMLA, such an exam cannot be conducted by the company's doctor. Arguably, Super Bull's-Eye was privileged to use the company's doctor as they were exploring an ADA accommodation, but it is these types of overlaps that allow a disgruntled employee to allege FMLA violations. Super Bull's-Eye should have first started the informal interactive process called for under the ADA to assess exactly what Mr. Monet was seeking and only then sent him to the company's doctor after informing Mr. Monet that such an examination was related to his ADA request for accommodation.)*

C. Leaves of Absence.

1. <u>FMLA</u>.

‘ 12 weeks of leave are available.

‘ Intermittent leave or reduced work schedules are permitted, but not for the birth or adoption of a child or the placement of a child for foster care.

‘ During leave, group health insurance must be provided and other benefit provisions should apply such that insurance coverage continues and does

not lapse and service has continued for purposes of vesting and eligibility in pension and other retirement plans.

‘ Upon return, employee must be returned to the same or equivalent job unless he is a highly compensated “key employee” to whom reinstatement may be denied if necessary to prevent substantial and grievous economic injury to the employer.

‘ An employer may not deny leave even if it appears that the employee will never be able to return to work. However, an employer may determine from the employee's physician the probable duration of the illness and terminate employment if and when the employee unequivocally advises that he does not intend to return to work. *(In our mock trial, Super Bull's-Eye cannot argue that it was not required to give Mr. Monet 12 weeks of FMLA leave because such a leave would not have assisted him in returning to the cashier or stock clerk positions.)*

2. <u>ADA</u>.

‘ Under the ADA, the employer's focus is on whether the employee is able to perform the essential functions of the job. An employee has no right to return if he cannot perform essential functions with or without a reasonable accommodation. If he can, he must return to the same job. If the employee can return with reasonable accommodations, the accommodations must be made. An employer has no obligation to create a new job, but may have to modify work schedules, restructure job, or reassign the employee to a vacant position. (*In our mock trial, Mr. Monet could not perform the essential functions of his job with or without a reasonable accommodation. Super Bull's-Eye did not have an obligation to restructure the stock clerk position by removing the cleaning duties, assuming that those tasks were essential to the stock clerk position. Super Bull's-Eye should have offered Mr. Monet the warehouse position and any other available position.*)

‘ Leave, intermittent leave, and/or reduced work schedules, barring undue hardship, can be accommodations provided that such leaves and modifications do not progress to the point where the person is not qualified to perform his job. *(In our mock trial, Super Bull's-Eye would have to show that its 30-day limit on Mr. Monet's leave was necessary because further leave would have constituted an undue hardship or that the situation had progressed to the point where Mr. Monet was no longer qualified to perform his job.)*

‘ The ADA does not require employers to provide insurance and other benefits unless they contribute to the effectiveness of a reasonable accommodation.

3. <u>Workers' Compensation</u>.

‘ Leave is provided to treat and assess the extent of an employee's occupational injury or as a result of a temporary or total disability. While there is no statutory requirement to maintain the employee's group health and other benefits, employers must treat employees on workers' compensation leave the same as they treat employees on other types of non-FMLA leave or face a state tort action.

‘ There is no set duration of workers' compensation leave in Nevada, but employers will want to have employees "rated" as to the extent of any permanent injury as soon as the employee's condition has stabilized.

‘ While not mandated, intermittent leave or a reduced schedule may be used as a form of light duty, and can be desirable to reduce an employer's exposure to temporary total disability and vocational rehabilitation benefits.

4. <u>Dual and Triple Coverage</u>.

‘ **Interplay Generally.**

‘ <u>FMLA and workers' compensation</u>: Lease may run concurrently, but an employer must designate it as such and provide notice to the employee. Employers should have procedures in place to aggressively designate workers' compensation leave as FMLA leave. While employers, with proper notice, can require that employees requesting FMLA leave take and exhaust all other paid leave and vacation time through a concurrent leave plan, an employer <u>cannot</u> force employees to substitute paid vacation or leave benefits for workers' compensation benefits. *(In our mock trial, Super Bull's-Eye failed to designate Mr. Monet's four weeks of leave following his industrial injury as FMLA-qualifying.)*

‘ <u>FMLA and ADA</u>: Leave can be considered a reasonable accommodation and count as FMLA entitlement as well. An employer must notice the employee that leave is being considered as both FMLA leave and an accommodation under the ADA. *(In our mock trial, Super Bull's-Eye provided 30 days of leave as an accommodation but did not designate it as FMLA leave.)*

- If an employer is already providing a reasonable accommodation, an FMLA leave request must also be accorded, and vice versa.

- Apply a 2-step process when an employee seeks leave.

- Apply FMLA certification requirements and determine whether employee satisfies requirements for leave.

- Allow FMLA leave if available and exhaustion thereof.

- After FMLA leave is exhausted or if it is not available, apply the ADA analysis to an employee's leave request and utilize, if necessary, the more comprehensive medical inquiries and/or exams permitted to determine what accommodation may be needed.

- **Intermittent Leave.**

  - Under the ADA, employee is required to show that the intermittent leave or reduced schedule would enable him to perform the essential functions of the job, and the intermittent leave must not be an undue hardship to the employer. Under the FMLA, the only requirement is a showing of a serious health condition and that the change in work schedule is medically necessary.

  - Under the FMLA, an employer may require an employee to transfer to another equivalent job for which he is qualified and which better accommodates the recurring periods of leave requested. The ADA would not require this, and an employee could be transferred to another position with lower pay and benefits if no equivalent position is available. To transfer an employee, however, the employer would have to show that the requested intermittent leave is an undue hardship in the present job or that the transfer with intermittent leave is an equally effective accommodation that the employer prefers and that is based on business reasons.

- **Benefits under Leave and Intermittent Leave.**

  - If the employee is on a reduced leave schedule such that he becomes ineligible for benefits, or if he is temporarily transferred to an alternative position that does not carry the same eligibility for benefits, the FMLA prohibits the employer from eliminating or reducing the previous benefits. The ADA does not impose the same requirement. If an employee is on a reduced schedule as a reasonable

accommodation, benefits can be reduced after FMLA entitlement elapses.

- **Return to Work.**

  - An employer cannot require an employee with an ADA disability that is also an occupational injury or disease to return to "full duty" because returning to full duty may include marginal, as well as non-essential job functions. An employer must make reasonable accommodations for an employee who is able to perform the essential functions of his job. Rehabilitation counselors, physicians, and other specialists utilized in the workers' compensation process are not responsible for identifying and addressing ADA return to work issues — the ultimate responsibility is placed on the employer.

  - If an occupational injury also constitutes an ADA disability, an employer must evaluate the possibility of reasonably accommodating the employee by placing him in a vacant position in addition to providing vocational rehabilitation benefits under NRS 616C.530 through NRS.616C.600. If an employer only provides vocational rehabilitation benefits and ignores the injured employee's request for an alternative job, it will face an ADA discrimination claim.

  - The EEOC has considered the workers' compensation/ADA overlap when issuing a policy letter on the relationship between the ADA and Nevada's vocational rehabilitation statutes. It observed that an employer that provides vocational rehabilitation benefits to an employee with an ADA disability related to an occupational injury is not automatically relieved of the obligation to provide reassignment to a vacant position under the ADA.

D. Light Duty Assignments.

1. FMLA.

- Employer cannot require light duty in lieu of FMLA.

2. ADA.

- Light duty can be a reasonable accommodation but there is no duty to create a position.

3. Workers' Compensation.

‘ Refusal to accept light or modified duty can result in termination of some types of benefits.

4. Dual or Triple Coverage.

‘ ADA and workers' compensation: Disabled employees can be placed in a light duty position and such positions cannot be reserved only for workers' compensation injuries. If a position is available, the disabled employee with or without an industrial injury may claim it. The EEOC distinguishes between light duty jobs that are "created" and those that are already in existence and "reserved" for individuals with workers' compensation claims. The EEOC has taken the position that reserved light-duty jobs cannot be held only for those employees with workers' compensation injuries. However, an employer may legitimately recognize its special obligation arising out of the employment relationship to create a light-duty position for employees with occupational injuries and illnesses, and decline to create a light-duty position for non-occupationally injured or ill employees with ADA disabilities, provided that the practice of creating such light-duty positions is applied in a non-discriminatory manner. The EEOC's analysis is akin to its position that under the ADA, an employer does not need to create a job for a disabled employee, but must place such an employee in a vacant position if doing so would be a reasonable accommodation. Employers need to be cautious, as distinguishing between "created" jobs and "reserved" jobs is not as easy as it seems.

‘ FMLA and workers' compensation: If an employee is certified to return to light duty, the employee can accept it, continue to receive workers' compensation payments, and end FMLA leave. Alternatively, the employee can reject light duty and stay on FMLA leave until he can return to the same or equivalent job or until his leave entitlement is exhausted. An employee who rejects light duty will no longer qualify for temporary disability payments under workers' compensation or for vocational rehabilitation benefits as long as certain statutory minima are met. See NRS 616C.475; NRS 616C.590.

E. Attendance Programs.

1. FMLA.

‘ Leave cannot be accounted against an employee for purposes of applying employer's absenteeism policy, even if the policy is a no fault policy.

2. <u>ADA</u>.

‘ Regular and reliable attendance can be an essential job function. Where it is not an essential job function, the employer may be required to suspend or modify its attendance policy.

To determine whether attendance is an essential function consider:

- frequency of absences;
- predictability of absences;
- level of skill required to perform the job;
- employer's policies concerning absences and extent of enforcement;
- employer's ability to accomplish its work; and
- whether the employee has to be present at work to perform the job.

3. <u>Workers' Compensation</u>.

‘ No fault attendance policies have withstood challenge under many states' anti-retaliation provisions and/or tort law because the polices are not directed solely at individuals covered by workers' compensation. However, in Nevada, there appears to be no published case law on the issue. Therefore, Nevada employers should refrain from applying no fault attendance policies to employees on workers' compensation leave until the law is clarified.

4. <u>Dual or Triple Coverage</u>.

‘ <u>ADA and workers' compensation</u>: Attendance can be a factor and may even render the employee unqualified under the disability definition. However, a flexible, part-time, or modified work schedule can be an accommodation under the ADA.

‘ <u>ADA and FMLA</u>: While attendance may render an employee unqualified for ADA protection, attendance cannot be an issue when FMLA is involved.

IV. APPLYING THE FMLA, ADA, AND WORKERS' COMPENSATION LAWS IN A UNIONIZED SETTING.

The three headed monster turns into four headed monster when the FMLA, the ADA, and workers' compensation laws are applied to unionized employees working under a collective bargaining agreement. Pursuant to the National Labor Relations Act ("NLRA"), employers with workforces represented by labor organizations have a legal duty to bargain over wages, hours, and other terms and conditions of employment. As a general rule, employers cannot make unilateral changes to employees' terms and conditions in employment without bargaining to impasse with the affected employees' designated labor representative. A failure to bargain in good faith can result in the filing of an unfair labor practice charge with the National Labor Relations Board ("NLRB"), an arbitrable grievance under the contract, or a National Labor Relations Act § 301 suit for breach of contract.

When an employer creates light-duty positions for employees with occupational injuries, seeks to return an employee coming back from FMLA leave to a substantially equivalent job because his former job is not available, seeks to have employees exhaust all paid leave prior to taking unpaid FMLA leave under a concurrent leave program, or reasonably accommodates an employee by modifying his job responsibilities or by moving him to a vacant position as required under the ADA, it can be acting unilaterally and thus subject itself to contractual liability as well as liability under the NLRA.[11]

[11]In1992, the EEOC and the NLRB attempted to develop a joint policy to resolve the conflicts between the ADA and the NLRA. After four months, the two agencies realized that their efforts were futile and stopped working on the joint policy. The most that the two agencies could agree to do was sign a 1993 Memorandum of Understanding providing that when the NLRB receives unfair labor practice charges which implicate the ADA, the General Counsel's

Furthermore, where a union represents a particular group of employees, an employer may not deal directly with employees to address employment issues. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).[12] However, such direct dealing is implicated when an employer engages in the informal interactive process to assess an employee's need for accommodation under the ADA.[13]

The process for handling such issues is not a simple one, nor does a single across the board resolution exist as to how the language of each collective bargaining agreement, and in particular, its management rights clause, impacts upon the way in which these situations should be handled. While the Court of Appeals for the Ninth Circuit has held that clearly established seniority rights need not be violated when considering whether or not a transfer to a vacant position is a reasonable accommodation under the ADA, such case law addresses only one of the myriad of overlaps between the FMLA/ADA/workers' compensation laws and the NLRA. One general suggestion can be made - modern day collective bargaining agreements need to be crafted to provide for the

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office will discuss the matters with the EEOC's Office of Legal Counsel. Likewise, when the EEOC receives discrimination charges that require an evaluation of the parties' duties under the NLRA, a similar discussion is to take place.

For a detailed discussion of the legal conflicts between the obligations under the ADA and the NLRA, see the August 7, 1992 National Labor Relations Board General Counsel Memorandum, GC-92-9, issued to all Regional Directors, Officers- in-Charge and Resident Officers.

[12]Yet, reasonable accommodations called for under the ADA may also result in duty of fair representation litigation against a union, both before the NLRB and in the courts, by a disabled individual whose request for an accommodation is blocked by the union or by a non-disabled employee whose interests are adversely affected by the union's consent to an accommodation. Duty of fair representation/breach of contract suits can be maintained against both the union and the employer, with damages apportioned between them according to fault.

[13]While one may quickly conclude that the way to address this problem is to involve the union in the interactive process, by having a union representative present, the employer may be breaching its confidentiality obligations under the ADA concerning the release of medical information.

inevitable tensions between the NLRA and the FMLA, the ADA, and state workers' compensation laws.

V. CONCLUSION.

Although workers' compensation statutes have been a part of an employer's legal considerations for some time, the 1990s brought about the introduction of the ADA and the FMLA, which substantially increased employees' rights concerning leave and job restructuring. The interplay of these three bodies of law poses a sizeable, but not insurmountable challenge. When confronted with the three headed monster, we recommend that human resource professionals, in-house counsel, managers, and supervisors analyze their and their company's responsibilities to employees by applying each of the laws separately to the facts of a given situation, while creating a solid and accurate paper trail.