

Navigating The Devil's Triangle:

The ADA From the Nevada Workers' Compensation Perspective

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Nevada Justice Association WC Completely Masterful

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“The Devil’s Triangle”

- Workers’ Comp



EMPLOYER

FMLA

ADA

Family And Medical Leave Act

Serious Health Condition

29 U.S.C. § 2601 et seq.

- Only applies to employers with 50 or more employees within a 75-mile radius of the location where the employee works.
- Employee must have worked for Employer for more than 12 months (not necessarily 12 in a row)
- Employee must have worked at least 1250 hours in the 12 months prior to the need for leave arising.
- Employee that qualifies is entitled to 12 weeks of leave (generally unpaid) per year—can be in continuous blocks or intermittent
- Employee entitled to be restored to his/her job or a substantially equivalent job at the end of leave.
- Benefits such as health insurance must continue during leave.

29 C.F.R § 825.702 (d)(2)

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a light duty position. If the employer offers such a position, the employee is permitted but not required to accept the position. See § 825.220(d). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See § 825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

Americans With Disabilities Act (NRS 613.330) Employer with 15 or more Employees

42 U.S.C. § 12101 et seq.

Definition of a Qualified Person With a Disability: A person with a disability who can perform the essential functions of a job with or without a reasonable accommodation

42 U.S.C. § 12102

(1) Disability

The term “disability” means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

ADA cont.

(2)Major life activities

(A)In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B)Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

ADA Cont.

42 U.S.C. § 12111

(8) Qualified individual

The term “qualified individual” means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

ADA Cont.

42 U.S.C. § 12111

(9) Reasonable accommodation

The term “reasonable accommodation” may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

ADA Cont.

29 CFR § 1630.2 (o)(3)

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

WORKERS' COMPENSATION

TEMPORARY TOTAL DISABILITY

PERMANENT PARTIAL DISABILITY

VOCATIONAL REHABILITATION

WORKERS' COMP VOC REHAB

NRS 616C.530

NRS 616C.530 Priorities for returning injured employee to work. An insurer shall adhere to the following priorities in returning an injured employee to work:

1. Return the injured employee to the job the injured employee had before his or her injury.
2. Return the injured employee to a job with the employer the injured employee worked for before his or her accident that accommodates any limitation imposed by the injury.

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WORKERS' COMP WRONGFUL DISCHARGE

Hanson v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984)

We know of no more effective way to nullify the basic purposes of Nevada's workmen's compensation system than to force employees to choose between a continuation of employment or the submission of an industrial claim...In view of the foregoing, our course is clear. We elect to support the established public policy of this state concerning injured workmen and adopt the narrow exception to the at-will employment rule recognizing that retaliatory discharge by an employer stemming from the filing of a workmen's compensation claim by an injured employee is actionable in tort.... We hold that, as with any intentional tort, punitive damages are appropriate in cases where employees can demonstrate malicious, oppressive or fraudulent conduct on the part of their employers...

SOLUTIONS?

- Hold the Interactive Process—encourage Employers to do so
- Employers should consider, in addition to any Voc Rehab Lump Sum buyout, offering some severance pay and obtain a release of claims in return
- Claimant's counsel should be sending letters to Employers requesting an interactive process and putting the Employers on notice of clients' rights under the ADA and the FMLA. Also warnings about workers' compensation wrongful discharge.

QUESTIONS?

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