

# Don't *leave* me!

FMLA, ADA, Worker's Comp, and Military Leaves

SC Association of Counties

August 18, 2023



GIGNILLIAT SAVITZ & BETTIS LLP

[www.gsblaw.net](http://www.gsblaw.net)

# Goals

- Understand the interplay among FMLA, ADA, & Worker's Compensation
- Spot common FMLA and ADA issues in Worker's Comp leaves
- Understand Military Leave obligations and interplay with FMLA



# Non-Military Leaves



GIGNILLIAT SAVITZ & BETTIS LLP

[www.gsblaw.net](http://www.gsblaw.net)

# Summary (non-military)

## ADA

- Prohibits discrimination
- Reasonable accommodations

## FMLA

- Minimum leave standards
- Acute (vs. chronic) need

## WC

- Quick payment for workplace injuries (medical bills and lost wages) & limited employer liability



# Who is covered?

- ADA
  - Employee or applicant
  - Able to perform essential functions
  - With or without reasonable accommodation
- FMLA (non-military)
  - Employed 12 months & 1250 hours in preceding 12 months
  - Can't perform any "essential function" due to "serious health condition"
  - Care for parent, child, spouse with serious health condition
  - Birth of newborn/placement of foster/adoptive child
- WC
  - Employee with on the job injury or occupational disease



# Accommodations?

- ADA
  - Reasonable accommodations required
- FMLA
  - Leave
  - Reduced hours
- WC
  - No specific requirement
  - Caution: job loss due to injury = increased claim value



# Leave?

- ADA
  - May be a reasonable accommodation
  - Case-by-case
  - No specific minimum or maximum
- FMLA
  - Up to 12 weeks in a rolling 12-month period
- WC
  - No specific requirement
  - Caution: retaliation claims



# Paid Leave?

- ADA
  - Usually not
- FMLA
  - No
  - Employer can require concurrent use
- WC
  - Yes, if cannot work due to injury





# Intermittent/Reduced Schedule Leave?

- ADA
  - No specific requirement
  - May be a reasonable accommodation
- FMLA
  - Yes
- WC
  - No



# Light Duty?

- ADA
  - May be reasonable accommodation
  - General goal: allow employee to perform essential functions of *his or her* job
- FMLA
  - Can offer; Cannot require
- WC
  - No specific requirement
  - “Encouraged” – employee refusal = benefit loss



# Reinstatement?

- ADA
  - Likely a reasonable accommodation (unless undue hardship)
- FMLA
  - Required
  - Same or equivalent job
- WC
  - No specific requirement
  - Caution: retaliation claims



# Fit-For-Duty?

- ADA
  - Job related
  - Necessary to determine ability to perform essential functions
- FMLA
  - Uniform practice
- WC
  - Usually required



# Medical Documentation?

- ADA
  - Post-offer/pre-employment
  - Current employees
    - Job related
    - Business necessity
      - Ability to perform job
      - Whether accommodation needed
- FMLA
  - Medical certification
  - Limited to DOL-mandated information
- WC
  - Required to substantiate claim



# Notice to Employer?

- ADA
  - No specific requirement
  - Put on notice of need for accommodation
- FMLA
  - No magic words
  - Must put on notice of qualifying need for leave
  - Duty to inquire
- WC
  - Must notify employer
  - Delay notifying may delay benefits



# Notice to Employee?

- ADA
  - Rights: poster
  - Benefits: no specific requirement
- FMLA
  - Rights
    - Poster
    - Policy
  - Benefits
    - Notice of Rights and Responsibilities (5 business days)
    - Designation Notice
- WC
  - Rights: poster
  - Benefits: no specific requirement
  - Must notify carrier of accident; carrier notifies WCC



# Retaliation Prohibited?

- ADA
  - Yes
- FMLA
  - Yes
- WC
  - Yes



GIGNILLIAT SAVITZ & BETTIS LLP

[www.gsblaw.net](http://www.gsblaw.net)



# Enforcement

- ADA
  - Equal Employment Opportunity Commission
  - State Human Affairs Commission
  - Courts
- FMLA
  - Department of Labor (Wage & Hour Division)
  - Courts
- WC
  - Workers' Compensation Commission
  - Appeals are to courts



GIGNILLIAT SAVITZ & BETTIS LLP

# Penalties & Relief

- ADA
  - Back wages
  - Reinstatement or “front pay”
  - Injunction (accommodations)
  - Equitable/compensatory damages
- FMLA
  - Back wages
  - Reinstatement or “front pay”
  - Injunction or other equitable relief
  - \*\*Personal liability\*\*



# Penalties & Relief

- WC
  - Medical treatment and therapy
  - Lost wages
  - Loss of use/impairment
  - Insurance
  - Retaliatory Discharge
    - Lost wages
    - Reinstatement
    - Typically not insured



# Special Problems

- Intermittent Leave
  - Scheduled vs. Unscheduled
  - Temporary transfers
- Reduced Schedule
  - Partial days/weeks
  - Is full-time essential?



# Special Problems

- Drugs
  - ADA
    - Excludes active illegal drug use
    - Covers addiction and prior drug use
  - FMLA
    - Absences due to active illegal use not covered
    - Absences for treatment are covered
  - WC
    - Likely denial of benefits



# Special Problems

- Alcohol
  - ADA
    - Alcoholism is covered
    - Absences due to being drunk/hungover?
  - FMLA
    - Treatment for alcohol dependency covered
    - Absences due to being drunk/hungover not covered
  - WC
    - Likely denial of benefits



# Special Problems

- Drug and Alcohol Testing
  - Drugs
    - ADA – permitted at any time; not a medical test
    - FMLA – not an issue
    - WC – typically required by carrier
    - Constitution
      - “Reasonable Suspicion”
      - Random/Suspicionless
        - CDL/DOT
        - Law Enforcement/Fire Supression/EMS



GIGNILLIAT SAVITZ & BETTIS LLP

# Special Problems

- Drug and Alcohol Testing
  - Alcohol
    - ADA
      - Generally prohibited – considered a medical test
      - Job related & consistent with business necessity
        - Reasonable suspicion
        - Limited random
    - FMLA – not an issue
    - WC – may be required by carrier
    - Constitution
      - “Reasonable Suspicion”
      - Random/Suspicionless – limited



GIGNILLIAT SAVITZ & BETTIS LLP



# Military Leave



GIGNILLIAT SAVITZ & BETTIS LLP

[www.gsblaw.net](http://www.gsblaw.net)

# Summary (military only)

## **FMLA**

- Leave for caregivers of vets and service-members with serious injury or illness
- Leave for qualifying exigencies

## **USERRA**

- Prohibits discrimination based on service
- Requires re-employment
- Health insurance continuation and reinstatement

## **SC Code § 8-7-90**

- 15 days paid leave per year for training or call-up
- Additional 30 days per call-up during an emergency



# Who is covered?

- FMLA
  - Employed 12 months (need not be consecutive)
  - Worked 1250 hours in preceding 12 months
- USERRA
  - All employees who join, serve, or served in the military
- State Law
  - Public employees (state and political subdivisions)
  - Who serve in National Guard or Reserves



# Leave Required?

- FMLA
  - Up to 26 weeks in a rolling 12-month period (Caregiver Leave)
  - Up to 12 weeks in a rolling 12-month period (Qualifying Exigency)
- USERRA
  - Up to 5 years
  - Some categories of service do not count toward the 5-year max
- State Law
  - 15 days per year
  - 30 days per emergency call-up
  - Requires above amounts to be paid



# Paid Leave?

- FMLA
  - No
  - Employer can require concurrent use of paid leave
- USERRA
  - No
  - Employees may use any banked annual leave they have
- State Law
  - Yes



# Reinstatement?

- FMLA
  - Required
  - Same or equivalent job
- USERRA
  - Yes
  - Escalator Principle
  - Retirement Plans
- State Law
  - No
  - But other laws do, including USERRA



# Notice to Employer?

- FMLA
  - No magic words
  - Must put on notice of qualifying need for leave
- USERRA
  - No set timeframe
  - May not delay granting leave when employee cannot produce orders or receives short notice of deployment
  - Maximum time to request return to work depending on length of leave
    - 1-30 days leave: First work day after travel and rest
    - 31-180 days leave: 14 days after completion of service
    - 180 or more days leave: 90 days after completion of service
- State Law
  - None specified



# Retaliation Prohibited?

- FMLA
  - Yes
- USERRA
  - Yes
  - Discharge only for cause for
    - 1 year: 180+ days of service
    - 180 days: 31-180 days of service
- State Law
  - Common law suit – violation of public policy



GIGNILLIAT SAVITZ & BETTIS LLP

[www.gsblaw.net](http://www.gsblaw.net)



# Enforcement

- FMLA
  - Department of Labor (Wage & Hour Division)
  - Courts
- USERRA
  - Department of Labor (Veterans' Employment & Training Serv.)
  - Courts
- State Law
  - Courts



# Penalties & Relief

- FMLA
  - Back wages
  - Reinstatement or “front pay”
  - Injunction or other equitable relief
  - \*\*Personal liability\*\*
- USERRA
  - Back wages
  - Reinstatement or “front pay”
  - Injunction or other equitable relief
- State Law
  - Back wages



# FMLA Qualifying Exigencies

- Short notice deployments (7 days or less)
- Military events and related activities (ceremonies, programs, briefings, family support meetings)
- Childcare and related activities (arranging for alternate care, enrolling in new school, immediate needs – not long term)
- Care for service member's parent
- Making or Updating Financial and Legal arrangements (wills, powers of attorney, etc., getting military IDs, enrolling in DEERS)
- Counseling (not provided by healthcare provider)
- Rest & Recuperation (15-day limit)
- Post-deployment activities (w/in 90 days of end of service)
- Any other reason agreed by employer and employee



# Does this leave count against the 5 years?

- Exceptions to 5-year limit subsume the rule!
  - <https://www.law.cornell.edu/cfr/text/20/1002.103> (list of exceptions)
  - How do I know?
    - Review orders
    - Look for statute that authorizes the call-up



# Questions?

Chris Johnson

[cjohnson@gsblaw.net](mailto:cjohnson@gsblaw.net)

(803) 799-9311



GIGNILLIAT SAVITZ & BETTIS LLP

[www.gsblaw.net](http://www.gsblaw.net)