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THE INTERACTION OF THE ADA, THE FMLA, AND WORKERS' COMPENSATION: WHY CAN'T WE BE FRIENDS?

S. Elizabeth Wilborn Malloy*

Each year, many workers suffer on-the-job injuries that require them to miss work or leave the workplace completely.¹ Although more action needs to be taken to prevent workplace injuries, the state and federal governments have enacted many laws to protect employees from some of the harsher effects of workplace injuries. State workers' compensation laws, as well as the state and federal disability and family medical leave statutes, provide a variety of protections for injured workers, including medical compensation, medical leave and, in some cases, workplace restructuring. Unfortunately, these statutes may overlap in ways that are not helpful to injured employees or their employers. For example, the purpose of workers' compensation is to provide medical and cash benefits to injured employees quickly, simply, and at low cost to both the employee and employer.² But when an employee is seriously injured on the job, requires time away from work, and returns to work with a permanent disability, workers' compensation is no longer quick, simple, or cheap for the employer. The employee may also receive protection under the Americans with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA"), as well as state versions of these acts, so the employer must carefully weigh the

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¹ See Louis Uchitelle, Laid-Off Workers Swelling the Cost of Disability Pay, N.Y. TIMES, Sept. 2, 2002, at A1 (discussing increase of 2.4 million workers on Social Security Disability Income ("SSDI") resulting in a sixty billion dollar price tag last year from this program). These statistics do not reflect the amount spent on workers' compensation, Americans with Disabilities Act or Family Medical Leave Act claims.

² See, e.g., Union Underwear Co., Inc. v. Scearce, 896 S.W.2d 7 (Ky. 1995) (finding that the purpose of Kentucky's workers' compensation statute is to provide for swift and inexpensive resolution of compensation claims); Mitee Enters. v. Yates, 865 S.W.2d 654 (Ky. 1993) (holding that the fundamental purpose of Kentucky's workers' compensation act is prompt resolution of such claims).
circumstances to consider to which benefits the employee is entitled. The confusion that results causes problems ranging from delays in appropriate worker protections, to wrongful denials or grants of benefits, to costly litigation. If an employer errs in the employee’s favor, the costs may be minimal. However, if the employer deals with hundreds or thousands of injured employees each year, the costs of these small errors may actually be quite large. If, on the other hand, the employer makes a one-time error in his own favor, the costs of the resulting litigation could be terribly damaging.

As employers struggle in this landscape, which they perceive to have razor sharp edges, others reap the rewards. This treacherous landscape is the home to a new profession: Medical Leave Administration, Management, and Return-To-Work Services. Professionals in this field are health care providers who lend their unbiased expertise to confused employers. To the employers, these counselors provide a helping hand across the rough terrain. More guidance comes from the assortment of new human resources software programs that have been developed to basically administer the FMLA for the employer. Imagine how injured employees must be feeling as they attempt to discern what benefits they are entitled to receive. Clearly, statutes that require professional assistance to employers in order for the benefits of those statutes to be handled properly does not appear to be in either the employer’s or the employee’s best interest.

This Article addresses some of the issues that arise when an employee injured at work qualifies for leave under the ADA, the FMLA and workers’ compensation statutes. Part II of the Article provides a brief overview of these three statutory schemes, focusing on the provisions, which define employee and employer qualification and the rights and responsibilities surrounding leave due to a work-related injury. Part III examines how the courts have resolved some of the overlapping and conflicting provisions contained in these statutes. This section particularly focuses on how the courts address employer obligations under all three statutes when an employee requests leave from work, as well as when an employee returns to work and requests a modified work schedule. Finally, this Article provides an overview of some of the potential solutions that a variety of commentators have suggested to help clarify the conflicting duties

4 For example, FMLA Pro is software that helps employers to track FMLA time and comply with FMLA regulations. See http://www.fmla.com.
5 See infra notes 8-118 and accompanying text.
6 See infra notes 119-89 and accompanying text.
and responsibilities of employers and employees under the ADA, FMLA and the Workers’ Compensation statutes.\(^7\)

I. THE STATUTORY LANDSCAPE

A. The Americans with Disabilities Act, 42 U.S.C. § 12101-12213

In enacting the Americans with Disabilities Act ("ADA" or "Act"),\(^8\) Congress found that discrimination and prejudice deny disabled persons the opportunities available to other members of free society, thereby preventing their ability to live independently and productively.\(^9\) The purpose of the ADA is to eliminate discrimination against persons with disabilities in all aspects of their daily lives.\(^10\) The ADA prohibits disability discrimination in employment, government services, housing and public accommodations.\(^11\)

Title I of the ADA bars disability discrimination in employment. Title I of the ADA applies to all employers with fifteen or more employees on each working day of at least twenty weeks of either the current or preceding year.\(^12\) Although the ADA specifically prohibits state and local governments from

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\(^7\) See infra notes 190-241 and accompanying text.

\(^8\) 42 U.S.C. § 12101-12213 (2000). The precursor to the ADA is the Rehabilitation Act of 1973, 29 U.S.C. § 791, which also prohibits discrimination against disabled individuals. The Rehabilitation Act, however, has a much narrower scope than the ADA and applies only to employment by federal agencies, federal contractors and recipients of federal financial assistance. See id. Because of its limited scope, a majority of public and private sector employees rely on the ADA to redress their disability discrimination claims. As a result, this Article will focus on the ADA.


\(^11\) See id. §§ 12101-12213; ROTHSTEIN, supra note 9, §§ 4-7.

\(^12\) See 42 U.S.C. § 12111(5)(A); Doe v. William Shapiro, Esq., P.C., 852 F. Supp. 1256 (E.D. Pa. 1994) (holding that a law office employing a legal staff of ten employees, but which was part of a larger leasing company, satisfied the ADA's employee requirement).
discriminating against disabled individuals, it is unclear how much protection the ADA provides to state employees. The Supreme Court has held that Title I does not permit state employees to sue for damages in federal court. However, Title II, which applies to state governments, may prohibit disability discrimination in state employment. Although the Department of Justice has interpreted the ADA’s Title II in this manner, the courts are split as to whether a state employee may sue under Title II for employment discrimination.

Title I of the ADA applies to employees who are qualified individuals with a disability. A person is a qualified individual with a disability if he or she is able to perform the essential functions of a job with or without a reasonable accommodation.

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13 See 42 U.S.C. § 12132 (prohibiting state and local governments from discriminating against otherwise qualified individuals with disabilities).


18 See Garrett, 531 U.S. at 630 n.1 (noting the split in the circuit courts as to whether Title II applies to state employment but not resolving it). In addition to the ADA and the Rehabilitation Act, most states have enacted statutes to protect the disabled from a variety of disability discrimination. For a discussion of some of the wide array of state disability statutes, see ROTHSTEIN, supra note 9, § 4.07.

19 See 42 U.S.C. § 12112(a).

20 See id. § 12111(8).
The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." This definition has been the subject of several recent Supreme Court cases. In *Sutton v. United Airlines, Inc.*, the Supreme Court held that if a person is able to mitigate the effects of a disability, a court should consider the effects of the disability in the corrected state when determining whether the person is disabled within the meaning of the statute. The Court applied this rule in *Murphy v. United Parcel Service*, where it ruled that summary judgment was appropriate as to whether a disability limits a major life activity because the record showed that, when medicated, the disability did not substantially limit any major life activity. In *Albertson’s, Inc. v. Kirkingsburg*, the Court reiterated that the substantial limitation provided in the definition of a disability requires more than a mere difference in the person's ability to perform a major life activity. The person must have a limitation that is "in fact substantial." And finally, in *Toyota Motor Manufacturing, Ky., Inc. v. Williams*, the Court stated that having a mere impairment does not make a person disabled under the ADA, even if the impairment affects the person’s ability to work. Rather, the impairment must affect “tasks of central importance” to the people’s lives.

The ADA prohibits employers from discriminating against a qualified individual with a disability because of the disability. Discrimination includes not making a reasonable accommodation for a qualified individual with a disability. A reasonable accommodation may include “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.”

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21 *Id.* § 12102(2). See also *ROTHSTEIN, supra* note 9, § 4.08.
23 See *Sutton*, 527 U.S. at 482.
24 See *Murphy*, 527 U.S. at 521.
25 See *Albertson*, 527 U.S. at 565.
26 *Id.* at 187.
27 See *Toyota*, 534 U.S. at 195.
28 See *id.* at 187.
29 See 42 U.S.C. § 12112(a) (2000); *ROTHSTEIN, supra* note 9, § 4.10.
31 42 U.S.C. § 12111(9)(B). See also *ROTHSTEIN, supra* note 9, § 4.20.
employer is only required to provide a reasonable accommodation for an employee if doing so will allow the disabled employee to perform the essential functions of the job.\textsuperscript{32}

An employer must provide a reasonable accommodation for a disabled applicant employee unless doing so would constitute an undue hardship.\textsuperscript{33} An undue hardship is "an action requiring significant difficulty or expense."\textsuperscript{34} Whether an accommodation amounts to an undue hardship should be considered in light of:

(i) the nature and cost of the accommodation needed under this Act;
(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.\textsuperscript{35}

When an employer learns that an employee is a qualified individual with a disability, the employer must participate in an interactive process with the employee to determine whether a reasonable accommodation might exist.\textsuperscript{36} The employer only needs to accommodate the employee in performing the essential functions of the job.\textsuperscript{37} An essential function is a fundamental duty of

\textsuperscript{32} See Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1260 (11th Cir. 2001).
\textsuperscript{33} See 42 U.S.C. § 12112(b)(5)(A); ROTHSTEIN, supra note 9, § 4.20.
\textsuperscript{34} 42 U.S.C. § 12111(10)(A).
\textsuperscript{35} 42 U.S.C. § 12111(10)(B). See Jones v. Int'l Riding Helmets, Ltd., 49 F.3d 692 (11th Cir. 1995) (finding that whether a modification to a work schedule is reasonable or an undue hardship is to consider its effectiveness in light of the nature of the disability and its costs); Hendry v. GTE North, Inc., 896 F. Supp. 816 (N.D. Ill. 1995) (holding that allowing the substitution of vacation time for sick leave would be an undue hardship on this employer due to cost factors).
\textsuperscript{36} See, e.g., Humphrey v. Mem'l Hosp. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001); ROTHSTEIN, supra note 9, § 4.20.
\textsuperscript{37} See Hoffman v. Caterpillar, Inc., 256 F.3d 568, 577 (7th Cir. 2001).
the job. The Act requires that consideration 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.” In addition, courts also generally consider the consequences of not requiring the function, as well as the work experience of current and prior incumbents.

If an employer violates Title I of the ADA, the employee may bring a private cause of action to enforce her rights. Remedies for violation of the Act include compensatory and punitive damages as well as equitable relief. A successful employee-plaintiff is also entitled to recover attorney’s fees.

B. The Family and Medical Leave Act, 29 U.S.C. § 2601 - 2654

The purpose of the Family and Medical Leave Act ("FMLA" or "Act") is "to balance the demands of the workplace with the needs of families." To accomplish this purpose, the FMLA entitles eligible employees to take up to twelve work weeks of leave during any twelve-month period because of the birth or adoption of a child, because of the need to care for a family member with a serious medical condition, or because of the employee’s serious medical condition. The FMLA reflects Congress’s concern that the primary responsibility for family care mainly falls on women and that such family responsibilities greatly affect the working opportunities of women more than those of men. Because a history of unconstitutional legislation mandating stereotypical family roles existed, Congress determined that women were unfairly losing jobs, and promotions to better jobs and remedies were required. Thus, the FMLA attempts to minimize the potential for employment discrimination on the basis of sex by ensuring that leave is available for health

38 See Kvorjak v. Maine, 259 F.3d 48, 55 (1st Cir. 2001).
40 See Kvorjak, 259 F.3d at 55.
41 See 42 U.S.C. § 12112(b)(5).
42 See 42 U.S.C. § 12112(d); EEOC v. Wal-Mart Stores, Inc., 198 F.3d 257 (10th Cir. 1999) (holding punitive damages appropriate when management discriminated against disabled employee); ROTHSTEIN, supra note 9, § 4.26.
and medical reasons, as well as important family reasons on a sex-neutral basis.\textsuperscript{47}

The FMLA applies to employers who employ fifty or more employees during twenty or more work weeks in either the current or preceding calendar year.\textsuperscript{48} However, an employer is excluded from the Act if fewer than fifty employees work within a seventy-five mile radius of the worksite.\textsuperscript{49} To be eligible for FMLA leave, an employee must have worked for the covered employer for at least twelve months, including at least 1,250 hours in the previous twelve-month period.\textsuperscript{50} Although the FMLA applies to states and state agencies,\textsuperscript{51} a majority of the federal circuit courts have held that states are not subject to the FMLA because the FMLA is not a valid exercise of Congress’s authority under Section 5 of the Fourteenth Amendment.\textsuperscript{52} The Supreme Court will resolve this issue this term.\textsuperscript{53} Based on the Supreme Court’s current federalism jurisprudence,\textsuperscript{54} it may be that state employees will

\textsuperscript{47} See id. § 2601(b).
\textsuperscript{48} See id. § 2611(4).
\textsuperscript{49} See id. § 2611(2)(B)(ii).
\textsuperscript{50} See id. § 2611(2)(A).
\textsuperscript{51} See id. § 2611(4)(A)(ii).
\textsuperscript{52} See Montgomery v. Maryland, 266 F.3d 334, 339 (4th Cir. 2001) (holding that the FMLA’s provision for twelve weeks of unpaid leave for an employee’s serious medical condition was not a valid abrogation of state sovereign immunity), cert. granted, 535 U.S. 1075 (U.S. May 20, 2002) (No. 01-1071); Sims v. Univ. of Cincinnati, 219 F.3d 559 (6th Cir. 2000) (holding that the FMLA was not a valid exercise of Congress’s power to enforce the Fourteenth Amendment and thus did not abrogate the state’s Eleventh Amendment immunity); Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000) (same); Hale v. Mann, 219 F.3d 61 (2d Cir. 2000) (same); Chittister v. Dep’t of Cmty. & Econ. Dev., 226 F.3d 223 (3d Cir. 2000); Garrett v. Univ. of Ala. Bd. of Trs., 193 F.3d 1214 (11th Cir. 1999), cert. granted in part on other grounds, 531 U.S. 356 (2001). But see Hibbs v. Dep’t of Human Res., 273 F.3d 844 (9th Cir. 2001) (holding that the FMLA’s provision for twelve weeks of unpaid leave to care for family member with serious health consideration was a valid exercise of Congress’s power under Section 5 of the Fourteenth Amendment), cert. granted, 122 S. Ct. 2618 (June 24, 2002) (No. 02-0103). For a discussion of the availability and sufficiency of state law claims for workers who can no longer use federal civil rights statutes to sue their state employer in federal court, see Landau, supra, note 15, at 186 (discussing FMLA’s application to state governments and the Supreme Court’s recent federalism jurisprudence as well as the availability of state claims and the various deficiencies of those state claims).
\textsuperscript{53} See Montgomery, 266 F.3d at 339; Hibbs, 273 F.3d at 844.
\textsuperscript{54} See, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that state employees could not seek damages from their employers for violation of the Age Discrimination in Employment Act); Garrett, 531 U.S. 356 (holding that state employees cannot sue their employers for violations of Title I of the ADA). For a discussion of the FMLA and a defense of
soon find themselves without a damages remedy in federal court for violation of the FMLA.

The Act enumerates the reasons for which an employee may take FMLA leave. These reasons are:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
(B) Because of the placement of a son or daughter with the employee for adoption or foster care.
(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

A serious health condition is defined as “an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.” According to Department of Labor Regulations, continuing medical treatment includes:

(i) A period of incapacity . . . of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: (A) Treatment two or more times by a health care provider . . . or (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.
(ii) Any period of incapacity due to pregnancy, or for prenatal care.
(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition . . .
(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective . . .

Congress’s authority to apply the statute to the states, see Christine Jolls, Antidiscrimination and Accommodation, 115 Harv. L. Rev. 642 (2001).

56 Id. § 2611(11). See Scamihorn v. Gen. Truck Drivers, Inc., 282 F.3d 1078 (9th Cir. 2002) (discussing whether depression and subsequent incapacity qualified as a serious health condition); Skrjanc v. Great Lakes Power Serv., Co., 272 F.3d 309 (6th Cir. 2001) (holding that employee’s foot injury for which physician recommended surgery requiring the employee to miss three months of work was a serious health condition covered by the FMLA); Brannon v. OshKosh B’Gosh, Inc., 897 F. Supp. 1028, 1037 (M.D. Tenn. 1995) (finding that a child who had a fever, was taken to a doctor, and stayed home from day care for four days, had a serious health condition within the requirements of FMLA).
(v) Any period of absence to receive multiple treatments . . . by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment . . .

An employee must give the employer thirty days notice of the need for leave if it is foreseeable, or else "such notice as is practicable." The employer may request certification by a health care provider as to the need for FMLA leave. The certification is considered to be sufficient if it includes: "(1) the date on which the serious health condition commenced; (2) the probable duration of the condition; and (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition . . ." A health care provider should do the certification. The health care provider must also certify that the employee is either unable to perform his or her job or needs to care for a family member.

The leave provided by the employer may be unpaid leave. However, the employer may require the employee to substitute any paid leave the employee has accrued for any part of the twelve-week leave period. If the total amount of paid leave available is less than twelve weeks, the remainder of the time to attain the twelve weeks required under the Act may be provided as unpaid leave.

An employee may take leave for the entire twelve weeks or any part thereof, or on an intermittent or reduced leave schedule. Intermittent leave is

57 29 C.F.R. 825.114(a) (2002).
58 29 U.S.C. § 2612(e)(1). See Satterfield v. Wal-Mart Stores, Inc., 135 F.3d 973 (5th Cir. 1998) (holding that employee did not provide her employer adequate notice of her need for FMLA for her unforeseeable medical problem or condition by notifying employer of pain in her side and of her intent to take one day off).
60 Id. § 2613(b). See Bailey v. Southwest Case Co., 275 F.3d 1181 (9th Cir. 2002) (finding that employer who requested medical certification of employee's serious medical condition did not interfere with the employee's FMLA rights).
61 See id. § 2613(a).
62 See id. § 2316(b)(4).
63 See id. § 2612(c).
64 See id. § 2612(d)(2).
65 See id. § 2612(d)(1).
66 See id. § 2612(b).
not available to care for a newborn or newly placed child unless the employer agrees to allow it.\textsuperscript{67} Intermittent leave is only available when medically necessary.\textsuperscript{68} The employer may request additional certification as to the need for intermittent leave.\textsuperscript{69} The employer may require the employee who requests intermittent leave to transfer to another equal position if doing so better accommodates the employer's needs during the time of the intermittent leave.\textsuperscript{70} Additionally, the employee is required to work with the employer to schedule leave in such a way as to avoid undue disruption of the workday.\textsuperscript{71}

An employee does not have to specifically request FMLA leave to qualify for leave under the Act.\textsuperscript{72} Rather, it is the employer's responsibility to identify FMLA leave.\textsuperscript{73} Courts have required the employer to timely notify the employee that his or her leave is FMLA leave.\textsuperscript{74} The Secretary of Labor's regulations implementing this portion of the Act state that "if the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement."\textsuperscript{75} However, the Supreme Court recently held that the notification is not essential unless the employee can prove that he or she would have acted differently had he or she known that the FMLA leave was counting against his or her entitlement.\textsuperscript{76}

\textsuperscript{67} See id. § 2612(b)(1); Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 163 (1st Cir. 1998) ("[O]ne reason for taking intermittent leave under the FMLA would be to visit the doctor for purposes of diagnosis and treatment, even if the employee does not take leave for such period in between such visits.").

\textsuperscript{68} See id. § 2612(b)(1).

\textsuperscript{69} See id. § 2613(5)-(7); Haggard v. Levi Strauss & Co., No. 00-2648, 8 Fed.Appx. 599 (Ark., 8th Cir. 2001) (finding that physician's note releasing employee to work half-days was not effective to trigger employee's FMLA right to intermittent leave because the physician's note did not explain the medical necessity for the leave).

\textsuperscript{70} See 29 U.S.C. § 2612(2)(B); Hatchett v. Philander Smith College, 251 F.3d 670 (8th Cir. 2001) (holding that employee who is unable to perform the essential functions of the job is not entitled to intermittent or reduced schedule leave under FMLA).


\textsuperscript{72} See Lowe v. Laidlaw Transit, Inc., 244 F.3d 1115, 1118 (9th Cir. 2001).

\textsuperscript{73} See 29 C.F.R. § 825.208(a) (2002).

\textsuperscript{74} See Plant v. Morton Int'l, Inc., 212 F.3d 929, 936 (6th Cir. 2000).

\textsuperscript{75} 29 C.F.R. § 825.700(a).

\textsuperscript{76} See Ragsdale v. Wolverine World Wide, 122 S. Ct. 1155, 1162 (2002) (holding that the Secretary of Labor's regulation requiring that leave taken by an employee does not count against the employee's FMLA entitlement if the employer does not designate the leave as FMLA leave was contrary to the language of the FMLA and beyond the authority of the Secretary).
While an employee is on FMLA leave, he or she is entitled to continued coverage under a group health plan. \(^{77}\) When the employee returns from leave, he or she must be restored to the position held prior to the leave, or a position equivalent in terms of "benefits, pay, and other terms and conditions of employment." \(^{78}\)

The FMLA makes it unlawful for employers to interfere with an employee's rights under the FMLA or to retaliate against an employee for exercising rights protected by the FMLA. \(^{79}\) Like the ADA, employees may bring a private right of action for violation of the FMLA. \(^{80}\) Damages include lost compensation (including lost wages, employment benefits or other compensation denied) or an amount equal to twelve weeks of compensation, plus interest, as well as an equal additional amount of liquidated damages and equitable relief (including reinstatement and promotion). \(^{81}\) Under the FMLA, a successful employee-plaintiff is entitled to reasonable attorney's fees, expert witness fees, and other costs of their lawsuit.

When rights to leave under the FMLA and ADA apply simultaneously, the statute providing greater protection to the employee controls. \(^{82}\) Unfortunately, making a determination as to which statute provides greater protection to an employee rarely proves to be an easy task. For example, the FMLA limits the employee's leave period to twelve weeks, while the ADA contains an "undue hardship" defense to its reasonable accommodation requirement. \(^{83}\) Depending on an employer's financial situation, it may be that the FMLA provides more protection because the employer may be able to demonstrate that twelve weeks of unpaid leave is an undue hardship. Thus, the issue always exists that one of the statutes may provide more protection in a particular situation than in


\(^{78}\) Id. § 2614(a)(1). See Mary Jean Geroul0, The Family Medical Leave Act: Reinstatement Following Leave: How to Cope From an Employer's Perspective, 2 HOUS. BUS. TAX J. 51 (2002) (noting problems for employer with FMLA's statutory language and potential broad scope).

\(^{79}\) See 29 U.S.C. § 2615(a);(b). See Darby v. Bratch, 287 F.3d 673 (8th Cir. 2002) (holding that employee who, while on FMLA had received an incident report which specifically listed unpaid leave as a problem, stated a valid FMLA claim for retaliation).

\(^{80}\) See 29 U.S.C. § 2617(a).

\(^{81}\) See id. § 2617(a)(I), (a)(II).

\(^{82}\) See 29 C.F.R. § 825.702(a) (2002) (stating that "[a]n employer must therefore provide leave under whichever statutory provision provides the greater rights to employees").

\(^{83}\) See Tardie v. Rehab. Hosp. of R.I., 168 F.3d 538, 544 (1st Cir. 1999) (stating that "it is not at all clear that the concept of 'reasonable accommodation' is appropriate in the FMLA context").
another, and the amount of protection will depend greatly on the facts of each specific case and cannot be generalized across employers and employees. 84

C. Workers' Compensation

Workers' compensation programs are run by the states, but are primarily based on the same model. 85 Workers' compensation is a no-fault system that is usually the exclusive remedy for workplace injuries. 86 This means that employees do not have to prove that the employer was at fault for the injury sustained by the employee, 87 but the employee may not sue the employer for any other benefits if the employee receives workers' compensation. 88 It represents a balance between the economic interests of the employer and the health and safety interests of the employee. 89

85 See OHIO CONST. art. II § 35 (providing for Ohio's workers' compensation system); KY. REV. STAT. ANN. § 342.340 (Michie 2002) (mandating that all employers provide workers' compensation); KY. REV. STAT. ANN. § 342.650 (Michie 2002) (listing the few exceptions of which employees are not covered by workers' compensation); OHIO REV. CODE ANN. § 4123.01 (Anderson 2001) (defining covered employers and employees); MODERN WORKERS COMPENSATION § 100:1 (West 2002); MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW vol. 2, at § 6.1, 6.2 (2d ed. West 1999).
86 See ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 100.01 (Matthew Bender 2002); ROTHSTEIN, supra note 85, §§ 6.3, 6.7.
87 See KY. REV. STAT. ANN. § 342.0011 (Michie 2002) (providing definition of injury for workers' compensation claim and requirement that injury be work-related); Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002); Hayes v. Gibson Hart Co., 789 S.W.2d 775, 775-76 (Ky. 1990); LARSON, supra note 86, § 1.01; MODERN WORKERS COMPENSATION, supra note 85, § 100:1; ROTHSTEIN, supra note 85, §§ 6.3, 6.7.
88 See LARSON, supra note 86, § 1.01; MODERN WORKERS COMPENSATION, supra note 85, § 102:1; ROTHSTEIN, supra note 85, §§ 6.3, 6.8.
In most states, all private and most public employees are covered by workers’ compensation, with few exceptions. Covered employers include all employers with one or more employee, although in some states a larger number of employees is required in order to be a covered employer under workers’ compensation statutes. Workers’ compensation statutes generally apply to accidental injuries that occur on the job. However, coverage is limited to injuries that “arise out of” and “in the course of” the employment relationship. The “arising out of” requirement refers to the underlying cause of the injury, whereas the “in the course of” requirement refers to the time, location, and conditions of the injury. Preexisting injuries that are aggravated and accelerated by work conditions may also be covered.

Covered injuries include traumatic injuries, as well as occupational exposure injuries.
The employee has an obligation to notify the employer as soon as practicable after the injury has occurred,\textsuperscript{100} and failure to do so may result in the employee being ineligible for benefits.\textsuperscript{101} The system is self-executing, in that as soon as the employer receives notice that the employee has a temporary disability, the employer must begin paying benefits without legal or administrative intervention.\textsuperscript{102}

There are several different types of benefits that employees may be eligible to receive, including medical care,\textsuperscript{103} disability payments,\textsuperscript{104} vocational rehabilitation,\textsuperscript{105} and death benefits.\textsuperscript{106} The employee is entitled to full payment of all reasonable medical bills for the treatment of the work-related injury.\textsuperscript{107} An employee who misses some statutorily defined number of days of work is also eligible for temporary total disability payments,\textsuperscript{108} which continues until either he or she is able to return to work or the injury is considered permanent.\textsuperscript{109} A person who is able to work, but not at the same capacity as

\textsuperscript{99} See KY. REV. STAT. ANN. § 342.020; Adkins v. R & S Body Co., 58 S.W.3d 428, 430 (Ky. 2000); LARSON, supra note 86, § 42.03; MODERN WORKERS COMPENSATION, supra note 85, § 109:1; ROTHSTEIN, supra note 85, at §§ 6.24, 6.99.

\textsuperscript{100} See KY. REV. STAT. ANN. § 342.730(1); LARSON, supra note 86, § 126.01; ROTHSTEIN, supra note 85, §§ 6.27, 6.121.

\textsuperscript{101} See KY. REV. STAT. ANN. § 342.710(3); Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387, 391 (Ky. 2002); Wilson v. SKW Alloys, 893 S.W.2d 800, 801-02 (Ky. 1995); ROTHSTEIN, supra note 85, §§ 6.27, 6.121.

\textsuperscript{102} See KY. REV. STAT. ANN. §§ 342.730(3), 750; Brusman v. Newport Steel Corp., 17 S.W.3d 514, 515 (Ky. 2000); ROTHSTEIN, supra note 85, §§ 6.27, 6.121.

\textsuperscript{103} See KY. REV. STAT. ANN. § 342.020; Commonwealth Dep’t of Highways v. Porter, 469 S.W.2d 350, 352 (Ky. 1971); LARSON, supra note 86, § 80.01; MODERN WORKERS COMPENSATION, supra note 85, § 202:1; ROTHSTEIN, supra note 85, §§ 6.27, 6.120-21.

\textsuperscript{104} See KY. REV. STAT. ANN. § 342.730(1)(a); LARSON, supra note 86, § 80.01; ROTHSTEIN, supra note 85, §§ 6.27, 6.120-21.

\textsuperscript{105} See KY. REV. STAT. ANN. § 342.730(1); LARSON, supra note 86, § 95.01; MODERN WORKERS COMPENSATION, supra note 85, § 200:1; ROTHSTEIN, supra note 85, §§ 6.28, 6.132.

\textsuperscript{106} See KY. REV. STAT. ANN. § 342.730; Clemco Fabricators v. Becker, 62 S.W.3d 396, 397-98 (Ky. 2002) (holding that no provision for temporary disability exists under Kentucky Law); LARSON, supra note 86, § 80.01; ROTHSTEIN, supra note 85, §§ 6.32, 6.146.

\textsuperscript{107} See Leeco, Inc. v. Crabtree, 966 S.W.2d 951, 955 (Ky. 1998); ROTHSTEIN, supra note 85, §§ 6.27, 6.120.


\textsuperscript{109} See ROTHSTEIN, supra note 85, §§ 6.28, 6.125; MODERN WORKERS COMPENSATION, supra note 85, § 200:31. See also LARSON, supra note 86, § 80.03[2].
before the injury, may be eligible for temporary partial disability.\textsuperscript{110} The purpose of disability benefits is to offset lost wages resulting from an inability to work.\textsuperscript{111}

An employee is eligible to receive temporary disability payments while being treated for and recovering from an employment injury.\textsuperscript{112} The employer is usually not obligated to continue paying these disability payments after a person has reached maximum medical improvement.\textsuperscript{113} At that time, if the effects of the injury persist, the employee may be eligible for permanent, partial or total disability payments.\textsuperscript{114} An employer may offer an injured employee a comparable job, and if the employee either takes the job or declines the job, the employer may terminate the benefits.\textsuperscript{115} If an employee who has reached maximum medical improvement fails to seek employment, the employer may discontinue disability benefits.\textsuperscript{116} Some states also provide for vocational rehabilitation to return an injured employee to some other gainful employment.\textsuperscript{117} If the employee is unable to return to work when he or she has reached maximum medical improvement, in some states the employer may terminate the employee.\textsuperscript{118}

II. THE CONFUSION SURROUNDING LEAVES OF ABSENCE AND RETURNS TO WORK

A. Leave of Absence

An employee with an injury or illness may require time away from work. An employer, in order to serve his or her economic interests, must know

\textsuperscript{110} See KY. REV. STAT. ANN. § 342.730; MODERN WORKERS COMPENSATION, supra note 85, § 200:7.
\textsuperscript{111} See MODERN WORKERS COMPENSATION, supra note 85, § 200:1; ROTHSTEIN, supra note 85, §§ 6.28, 6.124.
\textsuperscript{112} See ROTHSTEIN, supra note 85, §§ 6.28, 6.125.
\textsuperscript{113} See id. §§ 6.28, 6.125.
\textsuperscript{114} See id.; LARSON, supra note 86, § 80.04; MODERN WORKERS COMPENSATION, supra note 85, § 200:9.
\textsuperscript{115} See MODERN WORKERS COMPENSATION, supra note 85, § 200:31-32; ROTHSTEIN, supra note 85, §§ 6.28, 6.127.
\textsuperscript{116} See MODERN WORKERS COMPENSATION, supra note 85, § 200:34; ROTHSTEIN, supra note 85, §§ 6.28, 6.128.
\textsuperscript{117} See LARSON, supra note 86, § 95.01; MODERN WORKERS COMPENSATION, supra note 85, § 200:1; ROTHSTEIN, supra note 85, §§ 6.28, 6.132.
\textsuperscript{118} See ROTHSTEIN, supra note 85, §§ 6.39, 6.190-91.
whether or not an employee is entitled to the leave of absence he or she requests. This requires an ability to understand and implement the ADA, the FMLA, and workers' compensation statutes simultaneously.

An employee's right to leave is probably most protected by the FMLA, because it guarantees covered employees twelve weeks unpaid leave during each twelve month time period. However, the courts have limited the protection that employees receive under the FMLA by interpreting it strongly in favor of the employer.\textsuperscript{119} For example, the Eighth Circuit Court of Appeals recently held that the FMLA does not permit unpredictable absences throughout the career, because this would prevent the employee from being able to perform the essential functions of his or her job.\textsuperscript{120} The Eighth Circuit has also held that an employer may fire an employee for excessive absences if some of the unexcused absences were not FMLA protected.\textsuperscript{121} The Seventh Circuit Court of Appeals has held that an employee has an obligation to provide notice if possible, and that if the employee fails to give timely notice, the leave will not be protected from an automatic termination policy.\textsuperscript{122} The Eighth Circuit also has allowed an employer to fire an employee under an automatic termination policy because the employee was unable to perform the essential functions of the job at the end of the twelve weeks of leave.\textsuperscript{123} In addition, if an employee cannot meet the elements necessary to prove that his or her leave is FMLA protected, he or she can be discharged under a no-fault policy.\textsuperscript{124}

Nonetheless, an employer may not discharge an employee for legitimately using the twelve weeks of FMLA leave. If an employee who takes FMLA protected leave is discharged, and the employer can offer no other explanation for the discharge than excessive absenteeism, the discharge is properly


\textsuperscript{120} See Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847, 853 (8th Cir. 2002). \textit{See also} Collins v. NTTN-Bower Corp., 272 F.3d 1006, 1007 (7th Cir. 2001).

\textsuperscript{121} See Bailey v. Amsted Indus., 172 F.3d 1041, 1045 (8th Cir. 1999). \textit{See also} Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997).

\textsuperscript{122} See Gilliam v. United Parcel Serv., 233 F.3d 969, 970 (7th Cir. 2000).

\textsuperscript{123} See Reynolds v. Phillips & Temro, Inc., 195 F.3d 411, 414 (8th Cir. 1999).

\textsuperscript{124} See Bauer v. Varity Dayton-Walther Corp., 118 F.3d 1109, 1113 (6th Cir. 1997).
considered retaliatory. In that case, the employee can receive lost wages and
other lost benefits as well as her attorney’s fees.

The FMLA also allows employees to take the twelve weeks of leave on an
intermittent or reduced schedule basis. Intermittent or reduced schedule
leave is taken in brief time blocks, rather than one continuous period of time,
and may include leave from one hour to several weeks. In order to qualify
for intermittent or reduced schedule leave, an employee must be able to perform
the essential functions of the job while there. Intermittent leave must be
medically necessary for a serious health condition. The employee is also
required to work with the employer to avoid undue disruption of the
workday.

Although the FMLA provides the most protection to a worker needing a
leave of absence, the ADA policies on leaves of absence may be more
generous. When an employee needs a leave of absence to recuperate, it may be
a reasonable accommodation. The ADA does not specify a specific limit on
the length of a leave of absence; rather, the limit is based on whether the leave
requested would be an undue hardship to the employer. In fact, a leave of
absence may be considered a reasonable accommodation even when it is not
certain or even likely to successfully improve the employee’s condition, as long
as it could plausibly allow the employee to return to work. If an employer
fires an employee shortly after he or she requests a leave of absence, this may
show that the employer has failed to reasonably accommodate the employee.

There are, on the other hand, significant limitations imposed by the courts
on the use of leaves of absence under the ADA. For instance, courts have
found that working full time is probably an essential function of a full time
job. As such, unlimited sick days are not considered a reasonable accommodation. Likewise, an indefinite period of leave may not be considered a reasonable accommodation. Businesses are not obligated to tolerate erratic unreliable attendance, because this would be disruptive to the work environment. Additionally, when the accommodation has no reasonable prospect of allowing the employee to return to work in the identifiable future, an extended leave of absence is not a reasonable accommodation. Even if a leave of absence may be all that an employee needs to resume working, courts have held that attendance is an essential function of some jobs. In these cases, extended leave may not be considered a reasonable accommodation. When attendance is an essential function, an employer may discharge a disabled employee for excessive absences if a reasonable accommodation will not enable the employee to attain regular attendance. The Sixth Circuit has even held that when a company applies a uniform absence policy, this does not violate the ADA. However, some courts have cautioned that there should be no presumption that attendance is an essential function. Instead, the court should consider whether a leave of absence would place an undue hardship on the employer.

An employee may also be entitled to a leave of absence under state workers’ compensation legislation. In fact, workers’ compensation benefits usually begin after a certain statutorily defined period of absence resulting from a work related injury. When the benefits begin, the injured employee is usually entitled to continue receiving the benefits until he or she has reached maximum medical improvement, or is able to return to work. Workers’ compensation is less protective of employees’ rights to leave, though, because it

136 See e.g. DeVito v. Chicago Park Dist., 270 F.3d 532, 535 (7th Cir. 2001).
137 See EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 950 (7th Cir. 2001).
138 See Reed v. Petroleum Helicopters, Inc., 218 F.3d 477, 481 (5th Cir. 2000).
139 See Yellow Freight System, 253 F.3d at 950.
140 See Walsh v. United Parcel Serv., 201 F.3d 718, 727 (6th Cir. 2000).
141 See, e.g., Amadio v. Ford Motor Co., 238 F.3d 919, 927-29 (7th Cir. 2001).
142 See id.
143 See Hypes v. First Commerce Corp., 134 F.3d 721, 726 (5th Cir. 1998).
144 See Gantt v. Wilson Sporting Goods, 143 F.3d 1042, 1046 (6th Cir. 1998).
146 See id.
147 See MODERN WORKERS COMPENSATION, supra note 85, § 200:45; ROTHSTEIN, supra note 85, §§ 6.28, 6.124.
148 See ROTHSTEIN, supra note 85, §§ 6.28, 6.125.
often permits an employer to require the employee to return to a light duty job, or undergo vocational rehabilitation instead of continuing the leave of absence. When an employer does not provide these options to an employee, the employee who has reached maximum medical improvement still has an obligation to seek employment elsewhere in order to continue receiving disability benefits. In addition, if an employee is unable to return to work when he or she has reached maximum medical improvement, the employer may be permitted to terminate the employee.

An employer must be careful when implementing these policies simultaneously. The employer must observe the law that provides the greatest protection to its employees in the circumstances presented. When an employee's qualifying disability is also a serious medical condition, an employer covered under the FMLA is required to provide the employee with the twelve weeks of leave to which he is entitled under that statute, without consideration of whether the leave is an undue hardship under the ADA. If an employee requests a reasonable leave of absence longer than twelve weeks, and it is not an undue hardship for the employer to provide it, the employer must permit the leave under the ADA. However, not all serious health conditions are considered a disability, so an employee may not be entitled to more than the twelve weeks of leave permitted under the FMLA. Any leave taken under the ADA may be considered to have run concurrently with FMLA leave. An employer may also consider any leave taken under a workers' compensation claim as FMLA leave.

An employer may have more difficulty implementing the ADA and workers' compensation claims simultaneously. Some things that employees are permitted to do under most workers' compensation statutes are not permitted under the ADA. For instance, most workers' compensation statutes permit an employer to provide light duty work or vocational rehabilitation for injured employees to help them return to work more quickly, whereas under the ADA, the employee may be entitled to continue a leave of absence instead of taking

149 See id. §§ 6.28, 6.127.
150 See id. §§ 6.28, 6.132; MODERN WORKERS COMPENSATION, supra note 85, § 203:1.
151 See MODERN WORKERS COMPENSATION, supra note 85, § 200:34; ROTHSTEIN, supra note 85, §§ 6.28, 6.27-.28.
152 See ROTHSTEIN, supra note 85, §§ 6.39, 6.190-.91.
153 See 29 C.F.R § 825.702(a) (2002).
154 See 29 C.F.R. §§ 25.702(a) (2002) (if an employer is covered by more than one statute, the employer is obligated to follow the law that provides the most protection to the employee). See also www.eeoc.gov/docs/ffmlaada.txt.
another position because the ADA prefers accommodation in the current job over reassignment to another job. In addition, some employers have a 100 percent healed policy with regard to employees receiving workers' compensation benefits, which is a per se violation of the ADA. An employer must allow an employee who is able to perform the essential functions of a job, with or without reasonable accommodations, to return to work.

B. Returns to Work

When an employee is ready to return to work after leave time, the situation is no less troubling for an employer. The return-to-work requirements are different under the FMLA and the ADA, and those requirements may conflict with policies the employer has in place for returning-to-the-job injured workers who are receiving workers' compensation benefits.

Under the FMLA, the employer has an obligation to reinstate the employee to the same or similar job. The position must be the same in terms of pay, benefits, and status. If the employee has more FMLA time available, the employee may choose to return to work on an intermittent leave schedule. If the employee elects to do this, he or she must provide certification that the intermittent leave is medically necessary. In addition, the employee must attempt to schedule the periods of leave during mutually convenient times. The employer may move the employee to a different equal position during the reduced schedule leave time if it is more convenient for the employer.

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158 See Gunderson, 982 F. Supp. at 1238.

159 See id. § 2613(5)-(7).

160 See id. § 2613(5)-(7).


order to qualify for intermittent leave, the employee must be able to perform the essential functions of the job while he or she is there.\textsuperscript{163}

Under the ADA, an employee who is disabled may request a reasonable accommodation when returning to work, which may include a light duty assignment, intermittent leave, or reassignment.\textsuperscript{164} Although the employer has an obligation to attempt to provide an accommodation, the employer is not required to create a new position for an employee.\textsuperscript{165} Thus, in order to be considered a reasonable accommodation, the employee must be able to perform the essential functions of a currently existing position.

Courts have further restricted an employer's duty with respect to a disabled worker's accommodation requests. For instance, it has been held that working full time is an essential function of a full time job.\textsuperscript{166} This significantly limits the accommodations available to some employees, as an employer is under no duty to allow a person to work part time if there are no part time positions available.\textsuperscript{167} It has also been held that unlimited sick days are not a reasonable accommodation.\textsuperscript{168} This is because businesses are not obligated to tolerate erratic unreliable attendance, as this would be disruptive to the work environment.\textsuperscript{169}

An employee who cannot be accommodated in his or her current position may be reassigned to a different position. Reassignment is only considered a viable accommodation when accommodation in the current position would constitute undue hardship.\textsuperscript{170} Reasonable accommodation may include reassignment to any position that is currently vacant or that may become vacant in the fairly immediate future.\textsuperscript{171} When determining whether he or she is able to accommodate a disabled employee through reassignment, the employer must

\begin{footnotes}
\item[163] See Hatchett v. Philander Smith Coll., 251 F.3d 670, 676 (8th Cir. 2001).
\item[164] See Rothstein, supra note 9, § 4.20.
\item[166] See DeVito v. Chicago Park Dist., 270 F.3d 532, 535 (7th Cir. 2001).
\item[168] See EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 950 (7th Cir. 2001).
\item[169] See id.
\item[171] See Boykin v. ATC/VanCom of Col., 247 F.3d 1061, 1064 (10th Cir. 2001); Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 677 (7th Cir. 1998); Smith, 180 F.3d at 1174-75 (10th Cir. 1999).
\end{footnotes}
consider all available positions.\textsuperscript{172} However, if there are no positions currently available, the employer is not required to retain the employee indefinitely while waiting for a position to become available.\textsuperscript{173} An employer only has to reassign a person to a position for which he or she is qualified\textsuperscript{174} and does not have to consider positions that would be considered promotions.\textsuperscript{175} The reassignment may be to a position that is considered to be a demotion\textsuperscript{176} if the employer first considers lateral moves.\textsuperscript{177}

Reassignment to a light duty position is an acceptable accommodation.\textsuperscript{178} Although an employer must accommodate an employee with a light duty position if it is reasonable and a position is available, an employer has no duty to remove another employee from a position to make one available for the disabled employee.\textsuperscript{179} This includes even temporary workers.\textsuperscript{180} An employer does not have to allow a disabled person to permanently assume a previously temporary position\textsuperscript{181} because it would frustrate the purpose of temporary light duty positions to allow permanently impaired employees to fill them.\textsuperscript{182} An employer does not have to allow a disabled employee to assume a position that has traditionally been a rotating-type job, either, because that would essentially require the creation of a new position.\textsuperscript{183}

Recently, the Supreme Court considered reassignment with respect to a seniority system.\textsuperscript{184} The Court held that an employer was not required to reassign a disabled employee to a position as an accommodation if, under the employer's seniority system, other employees were entitled to that position.\textsuperscript{185} The seniority system need not be part of a collective bargaining agreement but must have been uniformly applied without multiple exceptions in order to

\textsuperscript{172} See Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1257 (11th Cir. 2001); Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 693 (7th Cir. 1998).
\textsuperscript{174} See Dalton, 141 F.3d at 677; Smith, 180 F.3d at 1178.
\textsuperscript{175} See Smith, 180 F.3d at 1176.
\textsuperscript{176} See Dalton, 141 F.3d at 678.
\textsuperscript{177} See Smith, 180 F.3d at 1177.
\textsuperscript{178} See Dalton, 141 F.3d at 680.
\textsuperscript{179} See id.
\textsuperscript{180} See id.
\textsuperscript{181} See id.
\textsuperscript{182} See Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 693 (7th Cir. 1998).
\textsuperscript{183} See Hoskins v. Oakland City Sherriff's Dept., 227 F.3d 719, 730 (6th Cir. 2000).
\textsuperscript{185} See id. at 1520.
trump an employee’s ADA reasonable accommodation claim. 186 Lower courts have also held that an employee is not required to make a reassignment that would violate another employee’s rights under a collective bargain agreement. 187 An Equal Employment Opportunity Commission (“EEOC”) opinion letter states that:

when an employer seeks to provide a reasonable accommodation that conflicts with collectively bargained seniority rules, the Commission’s position is that the substance of a union’s reasonable accommodation obligation is to negotiate with the employer to provide a variance to the collective bargaining agreement, if no other reasonable accommodation exists and the proposed accommodation does not unduly burden non-disabled workers or otherwise pose an undue hardship. 188

Courts have extended this position to provide that an employer does not have to violate any reasonable non-discriminatory policy supporting legitimate business interests in accommodating a disabled employee. 189

III. POTENTIAL SOLUTIONS TO THE OVERLAPPING RULES

Workers’ compensation costs have increased dramatically over the last several decades, 190 and many continue to advocate change even though states have acted to reform their systems in order to contain costs. 191 Recent federal legislation meant to protect workers seemingly adds to the costs of workers’ compensation because now employers must implement the FMLA concurrently with workers’ compensation programs and consider the ADA as they hire new workers or attempt to return previously injured employees to work. Some suggest that the ADA and the FMLA undermine the exclusive remedy provisions of workers’ compensation, thereby increasing the costs of workers’ compensation for employers. 192 Many employers are frustrated with both the

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186 See id. at 1519.
187 See Bratten v. SSI Servs., Inc., 185 F.3d 625, 634 (6th Cir. 1999).
189 See Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175-76 (10th Cir. 1999).
192 See Joan T.A. Gabel et al., The New Relationship Between Injured Worker and Employer:
increased costs of the administrative efforts to implement these intertwined programs, as well as the increased costs arising directly from them. As a result, scholars have suggested drastic reform, such as federalizing workers’ compensation, modifying the definition of disability, or increasing Occupational Safety and Health Administration (“OSHA”) regulation.

The goal of workers’ compensation is to benefit both the employer and the employee by providing guaranteed remedies for the employee while avoiding the expense of litigation for the employer by keeping the entire process within the administrative system. Scholars who suggest federalizing the workers’ compensation system argue that to do so would restore “uniformity, efficiency, fairness, and predictability” in the workers’ compensation system, while making it easier to administer the ADA and the FMLA in conjunction with workers’ compensation. While these are important goals with respect to reforming workers’ compensation, a federal workers’ compensation system is nonetheless impractical. Even if it were practical, it would not eliminate the difficulties in the implementation of the ADA and the FMLA with workers’ compensation.

Traditionally, states have been responsible for providing for the health and welfare of their citizens under the state police power. This is a power states would be unlikely to allow the federal government to usurp in the administration of a workers’ compensation program. In addition, workers’ compensation systems reflect the market of the area in which they exist. The differences in the compensation provided in each state are thus justified by market differences. A federal system would be less responsive to such market differences. Furthermore, a federal system would stifle innovation. Competition between the states has already led to decreased fraud, improved claims management, and the rise of managed care to help control costs and ensure proper payments to injured workers.
In addition, adopting a federal workers' compensation would probably not be effective in containing employers' costs. While employers' costs reached an all time high in the early part of the 1990s, reform at the state level has led to a decline in the trend, and even some significant decreases in costs for employers. These changes in the costs of workers' compensation have occurred for a multitude of reasons. The incidence rate of injuries involving days away from work has decreased or remained steady every year since 1992. Cases involving the payment of benefits for missed work make up only twenty-four percent of the total number of workers' compensation cases, but amount to ninety-four percent of all benefits paid, such that the incidence rate of these more serious injuries significantly affects the overall cost of workers' compensation. In 2000, more than forty-four percent of benefits paid were medical benefits. This is a high percentage in comparison to the last several decades, which suggests employees are experiencing fewer missed days per injury, or are receiving less cash benefits for missed work.

The states acted quickly and accurately to contain the rising costs of which employers complained. A federal system would take longer to react to the need for change. At the state level, employers pay for the entire workers' compensation system. Eighty-two percent of the total employer costs are benefits paid. Administrative costs and insurance profits make up the other eighteen percent of employers' costs. A federal system would probably not be this efficient.

Even if a federal system was adopted, it would not eliminate the difficulties in the implementation of the ADA and the FMLA with workers' compensation. For the employer and the employee both, the most basic purpose of the workers' compensation is to decrease loss by appropriately providing for the needs of an employee after an injury so that he or she may return to work as expediently as possible. Workers' compensation is a risk minimization program for both the employer and the employee. It has been suggested that

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199 See Mont et al., *supra* note 197, at 22.

200 In 1992, benefits per $100 of payroll were $1.68, while in 2000, they were thirty-eight percent lower at $1.03. See Mont, *supra* note 197, at 24.

201 See Mont, *supra* note 197, at 26.

202 See id. at 27.

203 See id. at 13.

204 See id.

205 See id. at 24.

206 See id.
the ADA and workers' compensation conflict because the ADA focuses on how much a person can do, while workers' compensation statutes focus significantly on a person's loss of functional capacity.\footnote{See Gabel, supra note 191, at 1098.} However, the ADA is actually similar to workers' compensation in that its purpose is to assist as many disabled individuals as possible to attain gainful employment.

This misses the much bigger point, though, which is that comparing workers' compensation to the ADA is like comparing apples to oranges. The ADA is legislation against discrimination, and to whatever extent that it disrupts the exclusive remedy provisions of workers' compensation statutes, it will continue to do so whether the statutes are state statutes or federal statutes. This is not a conflict that can be altered, because it is not a conflict at all. As Professor Ranko Shiraki Oliver has pointed out, a charge of disability discrimination is not inconsistent with exclusive remedy provisions because it is not seeking additional recovery for an injury.\footnote{See Ranko Shiraki Oliver, The Impact of Title I of the Americans with Disabilities Act of 1990 on Workers' Compensation Law, 16 U. ARK. LITTLE ROCK L.J. 327, 370 (1994).} Rather, it is a request for recovery from an employer's failure to comply with discrimination legislation.\footnote{See id. at 371.}

Although the ultimate goals of the two programs are not conflicting, they may have conflicting requirements. Employers are often permitted to have a policy requiring an employee to be completely healed before returning to work under a workers' compensation program, whereas under the ADA, this is an impermissible requirement.\footnote{See ROTHSTEIN, supra note 9, § 4.20.} This is the functional equivalent of refusing to employ the person because of his or her disability. An employee who recovers damages because his employer has discriminated against him has done nothing to upset the workers' compensation system. It is unlikely that it would not change in a federal system.

Although proponents present similar arguments with respect to the FMLA, the arguments do not seem to be that the FMLA adds significant costs to workers' compensation.\footnote{See, e.g., Gabel, supra note 192, at 422-27.} Rather, the arguments seem to be that the FMLA is difficult to administer in general, and that employers do not like the benefits it provides to employees.\footnote{See Geroulo, supra note 78, at 55; Gabel, supra note 192, at 422-27.} For instance, one argument is that it makes it difficult for employers to get employees to come back to work, because an
employee who has been cleared for work by the workers' compensation physician may seek a second opinion by his or her own physician. 213 If his or her own physician certifies that the employee has a serious health condition, the employee may remain on leave. However, at this time, the employer may still terminate the workers' compensation benefits and put the employee on the unpaid leave to which he is entitled. It is doubtful that in federalizing a workers' compensation program, Congress also would decide to rewrite the benefits provided under the FMLA, and yet, that seems to be the only way that these so-called problems between workers' compensation programs and the FMLA could be solved.

It is doubtful that a federal workers' compensation system would alleviate any of the problems related to the implementation of these three pieces of legislation. The ADA and the FMLA continue to offer benefits to employees at the expense of employers, of which employers are not likely to appreciate the full value. And they will still have to be implemented simultaneously with workers' compensation whether it is a state or federal program. Finally, it is probably a program most appropriately provided by the states.

Although a federal workers' compensation system would not likely benefit the employee or the employer, increased regulation by OSHA may in fact ease pressures within the workers' compensation system. The purpose of the OSHA is to provide a safe work environment by providing regulations regarding the health and safety of employees. 214 Currently, however, OSHA is under-funded, understaffed, and overextended. 215 As a result, OSHA has been unable to make widespread efforts to abate workplace dangers. Instead, OSHA has targeted particularly dangerous occupations for regulation and inspection activity. 216 In these particularly dangerous occupations, it seems OSHA activity has led to a decrease in the incidence of workplace injury. 217 This suggests that if OSHA were given the funding and manpower to extend its activities more generally to all work environments, the incidence of workplace injury would also generally

213 See Gabel, supra note 192, at 426.
decline. As the rate of injury decreases, workers' compensation costs probably also decrease. 218

Some argue that the costs associated with workers' compensation are the only incentive employers need to provide workplace safety, such that OSHA involvement is unnecessary. 219 However, studies show that, for a multitude of reasons, workers' compensation costs are not an effective incentive to an employer to improve workplace conditions. 220 Often, workers' compensation benefits paid to injured workers are lower than the actual damages they have incurred. 221 In addition, the insurance premiums firms pay, particularly small firms, do not accurately reflect their claims experience, because insurance companies do not charge smaller firms based on their history of injury. 222 For these reasons, the costs of workers' compensation are lower than the costs associated with abating injury, and so there is no incentive to attempt to prevent workplace injuries. 223 However, if there were appropriate fines attached to failing to adopt policies and provide equipment most effective in protecting the health and safety of employees, there would be greater incentive to comply, because the total cost of abatement would then be less than the cost of the injuries sustained by employees. 224 The only way that this incentive could ever be realized would be to increase OSHA's ability to have "a direct, substantial, and continuing presence" in industry by increasing its resources. 225

It has also been suggested that modifying the ADA's definition of disability in order to "create conceptual clarity to disentangle the . . . policies, so that they are viewed as serving different groups," might help reconcile the ADA with other benefits programs. 226 Moreover, the different definition may help to provide much needed clarity to the employees, employers and, in particular, to

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218 For example, the incidence rate of workplace injuries and illnesses has steadily declined between 1993 and 2000. During this same time period, employer costs fell from 2.16% of payroll to just 1.25%. See Mont et al., supra note 197, at 25.
219 See McGarity & Shapiro, supra note 217, at 599.
220 See id. at 601.
221 See Shapiro & Rabinowitz, supra note 215, at 105. See also McGarity & Shapiro, supra note 217, at 599.
222 See Shapiro & Rabinowitz, supra note 215, at 106.
223 See McGarity & Shapiro, supra note 217, at 602.
225 McGarity & Shapiro, supra note 217, at 608.
the courts. Different scholars have suggested a variety of different ways to amend the definition of disability. Professor Matthew Diller, however points out that many of these scholars have the goal of creating a system in which a person is only entitled to the benefits of one statute at a time. Thus, a person who is injured under workers' compensation would not also be considered disabled under the ADA. This method reduces some of the confusion and uncertainty involved in the administration of these programs because it seeks to separate workers into mutually exclusive groups.

Although a new definition of disability under the ADA would significantly decrease the effort involved in administering the statutes and provide a much needed clarity, it is not sound to believe that it would create a system where individuals are entitled to only disability benefits under one statute for workplace injuries and illnesses. As Professor Diller pointed out, this approach ignores the social situation of many people who seek the benefits of multiple public programs. In addition, it tends to ignore the varying goals of the different policies. A person who is injured on the job and receives benefits under workers' compensation may still experience stigmatization when he or she attempts to return to the workforce. This person still needs the protection of the ADA, and to change the definition of disability to one that does not include the worker would be a disservice to all but the employer who wishes to discriminate.

This idea is closely tied to a current phenomenon observable in dual-benefits litigation: judicial estoppel. This occurs when courts perceive that the tensions between two different benefits programs prohibit a person from qualifying for benefits under both programs. The Supreme Court addressed the issue of estoppel in Cleveland v. Policy Management Systems. The Court found that “there are ... many situations in which a social security disability

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228 See Diller, supra note 226, at 1033-55; Rothstein et al., supra note 227, at 269-75.
229 See Diller, supra note 226, at 1033-55. But see Rothstein et al., supra note 227, at 273 n. 196 (noting that their proposal to adopt a medical definition of disability will not interfere with the individual's ability to benefit from worker's compensation or social security disability insurance).
230 See Diller, supra note 226, at 1035.
231 See id., at 1042.
232 See id., at 1033.
233 526 U.S. 795, 797-98 (1999) (holding that the plaintiff must explain why the Social Security Disability Income ("SSDI") contention is consistent with her ADA claim that she could "perform the essential functions of her previous job, at least with reasonable accommodations").
claim and an ADA claim can comfortably exist side-by-side.\textsuperscript{234} In that case, the Court held that an ADA claim would not be automatically estopped by a seemingly conflicting prior Social Security benefits claim unless the person bringing the claim was unable to explain the conflict.\textsuperscript{235} Unfortunately, this decision has not prevented continued litigation over the estoppel issue.\textsuperscript{236}

This type of conflict continues to be an issue in claims involving both workers’ compensation and the ADA. Employees who claim and receive benefits for some kind of disability under workers’ compensation may be estopped from bringing an ADA claim for reasonable accommodation.\textsuperscript{237} Some courts will more closely scrutinize the situation, allowing the employee to attempt to reconcile any apparent inconsistencies between the two claims.\textsuperscript{238} They do this because the two statutes under which the employee sought protection may serve different purposes and involve different inquiries into the nature of the disability.\textsuperscript{239}

When a court applies judicial estoppel to foreclose an individual from bringing an ADA claim, it focuses its efforts on the disability and perceived inability to work.\textsuperscript{240} This obstructs a central function of the ADA – to support the efforts of disabled individuals in obtaining employment – because it undermines its principal premise that people with disabilities should be presumed capable of working.\textsuperscript{241}

\textsuperscript{234} Id. at 802-03 (holding that the application for and receipt of SSDI benefits does not automatically estop the recipient, or erect a strong presumption against the recipient’s pursuit of ADA claim).

\textsuperscript{235} See id. at 804-05.


\textsuperscript{237} See, e.g., Jones v. United Parcel Serv., 214 F.3d 402, 406 (3d Cir. 2000).

\textsuperscript{238} See Fox v. Gen. Motors Corp., 247 F.3d 169, 177 (4th Cir. 2001).

\textsuperscript{239} See id. at 177.

\textsuperscript{240} See generally Diller, supra note 226, at 1003.

\textsuperscript{241} Arlene Mayerson, The History of the ADA: A Movement Perspective, in Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans 17, 24 (Lawrence O. Gostin & Henry A. Beyer eds., 1993).
IV. CONCLUSION

The many social policies serving disabled individuals in this country have diverse and valuable goals. Efforts to narrowly tailor statutes to prevent individuals from being able to qualify for more than one benefit program may very well keep many deserving people from qualifying for any benefit program. The current system has its faults. It may require administrative efforts on the part of employers, and litigation may arise from time to time. But lofty goals sometimes require vague wording and skillful application. At this time, a huge change in the manner in which these programs define those eligible in order to prevent various statutes from overlapping would not seem to be necessary and would most likely harm those most in need of protection from discrimination and potential job loss.