

Disciplining Workers in

The Devil's Triangle:

Workers' Comp., ADA, and FMLA

November 1, 2007

Andrew Froman, Tampa Office

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at Worksm

www.laborlawyers.com

Overview

- Basics of each law
- Leave Scenarios
 - “Full-time”
 - Intermittent
- Job restoration
- Conflicts among the laws
- Commonalities among the laws

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FMLA's Purpose

- **12 Weeks of Unpaid Leave**
- **Qualifying Reasons**
- **Job Protection**
- **Benefits Continuation**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

ADA's Purpose

- To create level playing field for “disabled” employees or applicants
- Emphasize what individuals can do, not on limitations
- Consider individual's ability to perform essential job functions
- May require reasonable accommodation by the employer

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Worker's Compensation's Focus

- Focus is opposite of ADA
- Emphasize what employee cannot do
- Provides compensation and medical expenses for work-related injury regardless of fault

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Common Areas of Overlap

- Entitlement to full time leave
- Right to reinstatement
- Obligation/Opportunity to place employee on light (we like to say “transitional”) duty

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FMLA Leave Only

- Some leaves exclusively covered by FMLA, e.g., birth, adoption, or placement for foster care
 - Employer may generally require continuous full time leave
 - Must be taken within 12 months of birth, adoption or placement
 - STATE LAWS MAY PROVIDE ADDITIONAL RIGHTS

FMLA Leave Only

- No Workers' Compensation
- Not ADA covered because of temporary condition
- General FMLA Obligations
 - Give Notice to Employee that leave counts towards FMLA entitlement
 - If consistent with other policies, may require employee to utilize available paid leave to run concurrently with 12 weeks of FMLA leave

FMLA Leave Only

- Leave to care for ill spouse, child or parent with “serious health condition” exclusively FMLA leave
 - Workers’ Compensation and the ADA apply only to employees
- Should require certification from health care provider (Note: As in workers’ comp. employer has a right to inquire of the health care provider regarding extent and nature of the “condition,” and to go with the employee to the provider to learn about the “treatment.”)
 - Certifying “serious health condition” and that employee’s presence medically necessary for care

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

ADA Leave Only

- Some leaves may be covered only by the ADA
 - Someone confined to a wheelchair
 - Who is not FMLA eligible employee or does not currently need time away from work;
 - Caused by a non-work related injury;
- Must reasonably accommodate

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FMLA and ADA Leaves

- Frequently involve serious chronic conditions
 - AIDS, emphysema, migraines
 - Non-occupational injuries requiring recuperation and resulting in a disability
 - Loss of a limb
 - Some serious back injuries

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FMLA and ADA Leaves

- Employer for such leaves should
 - Request medical certification
 - Designate FMLA leave to run concurrently with other leaves
 - Avoid counting absences under standard no-fault policies

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FMLA and ADA Leaves

- Even if employee exhausts 12 weeks of FMLA leave, ADA may require additional leave as a “reasonable accommodation”
 - Generally, some additional unpaid leave will be required
 - No set period of leave
 - Leave of indefinite duration not required

FMLA and ADA Leaves

- Bottom Line Considerations for extending leave beyond 12 weeks of FMLA coverage
 - Is additional leave a reasonable accommodation?
 - Require the employee to request additional leave in writing
 - Notify employee that FMLA leave has expired

FMLA and ADA Leaves

- Bottom Line Considerations for extending leave beyond 12 weeks of FMLA coverage
 - Determine whether you can hold position for employee or whether will consider employee for available positions upon return to work
 - Require a fitness for duty release before return to work
 - Do not guarantee indefinite leave

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FMLA and Workers' Compensation

- Leaves covered by both FMLA and WC
 - If work-related injury that keeps employee from working three or more days
 - Employers frequently forget to designate the leave as FMLA-qualifying
 - If unsure, at least preliminarily designate as FMLA

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FMLA and Workers' Compensation

- If able to return to work during 12 weeks of FMLA leave
 - Reinstatement to same or equivalent position
 - State WC laws may have similar obligations

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FMLA and Workers' Compensation

- **If not able to return to work during 12 weeks of FMLA leave**
 - Consider modified or temporary light duty*
 - Cannot be compelled under FMLA
 - Refusal may jeopardize continued eligibility for WC benefits

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FMLA, ADA and WC

- Some leaves of absence implicate all three statutes
 - A FMLA-covered employee with a “serious health condition”;
 - Suffered the injury on the job; and
 - The injury is serious enough to qualify as an ADA “disability”

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Intermittent Leave/Reduced Work Schedule

- FMLA requires for serious health conditions if medically necessary
- May require that absences be scheduled so as to minimize disruption
- May consider temporary reassignment to equivalent position
- If condition also qualifies as a disability, may need to allow beyond the 12 weeks of FMLA leave
 - If reasonable accommodation and it does not pose an undue hardship

Light Duty Assignments

- Treatment of “light duty” assignments varies:
 - During FMLA leave – cannot be required
 - Employee entitled to take time off
 - Employee may decline light duty
 - Workers’ Compensation systems allow it
 - Useful tool to reduce costs
 - Employees who refuse may be disqualified from income benefits
 - Once FMLA expires for an industrial injury, can then require light duty

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Light/Transitional

Duty Assignments

- The ADA encourages light/transitional duty
 - May be considered a required “reasonable accommodation”
 - Need not create a light/transitional duty position
 - Must consider temporary assignment to existing light/transitional duty position

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Conflicts Among the Laws

- Use of accumulated paid leave
 - Can require for unpaid FMLA & ADA
 - Not allowed for WC
- Employee refusal of leave
 - Employee can't refuse FMLA or WC
 - Employee can refuse leave as a reasonable accommodation under ADA
- COBRA
 - FMLA leave does not trigger COBRA, but ADA and Workers' Compensation leaves may trigger

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Conflicts Among the Laws

- Employer Designation
 - Should designate FMLA leave
 - Optional under the ADA, but advised
 - Not required for WC
- Intermittent or Sporadic Leave
 - Protected under the FMLA
 - Generally considered unreasonable under ADA

Commonalities Among the Laws

- Posting requirements
- No pay by employer required
- Employee must pay his or her portion of insurance premiums

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Commonalities Among the Laws

- Confidentiality of medical information must be maintained
- Obtain medical opinion

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

WC TIPS

- **Make FMLA designation when appropriate**
- **Advise doctors and coordinators of FMLA implications**
- **Track time off against FMLA entitlement**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FMLA TIPS

- **Train your supervisors**
- **Coordinate with WC leave**
- **Use caution in pursuing second opinions from regular physician**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

ADA TIPS

- Use caution before saying, “no”
- Make decisions based on abilities, as well as limitations
- Do not rely solely on WC evaluations in making return to work decisions

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Some Points to Consider

- No stereotypes
- Don't play doctor
- Start the clock running
- Run leaves concurrently
- Use right forms and follow company procedures
- Confine light duty to temporary

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Some More Points to Consider

- Document leave requests and respond to them in writing
- Require appropriate medical information
- Consult the person responsible for compliance in this area
- Evaluate fitness for return to duty on individualized basis
- Implement safety procedures to eliminate unsafe work conditions

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Disciplining in the Bermuda Triangle

- **Don't Despair!**
- **All three statutes allow for disciplining employees when appropriate, even if they are entitled to the benefits of the applicable statute.**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Disciplining a Workers' Comp. Recipient

- An employee who is injured in the work place is entitled to the benefits. That's the easy part.
- An employee who is injured in the work place because they ignored or violated work place rules, including safety rules, receives benefits, but also can receive discipline.
- Problem comes when they claim retaliation

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Ensuring the Discipline Sticks

- **Publish and post your workplace rules of conduct**
- **Publish and post your workplace rules of safety**
- **Make sure the folks who need safety equipment – weight belts, back braces, safety goggles, seat belts, hand trucks – have them and use them**
- **Document, document, document**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Assess Discipline Evenly

- Do not discipline someone injured in a work place accident who violated safety rules more severely than a rule violator who is NOT injured
- Do not “discipline” a safety rule violator by denying them worker’s comp. benefits
- A rule violator can be disciplined, even with termination, but not by denying them health care and treatment for injury
- Not advisable to deny lost wages either
- More appropriate to wait for MMI, then terminate if the rule violation warrants

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Dealing with Drug & Alcohol Abuse

- Florida has two applicable statutes
- Fla. Stat. §440.102 The Private Sector Workers Comp. Statute - drug free workplace provisions
- Fla. Stat. §112.102 Public Employer Workers Comp. Statute - Drug Free Workplace provisions

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Insurance Discounts for Drug Free Workplace

- Both statutes provide Workers Comp. insurance discounts (5 percent) for employers who maintain a drug free work place
- Employer must have a published policy, a valid testing program, educational component, published grounds and procedures for testing, confirmation procedures, opportunity to explain, treatment options
- Policy must be applied equally to all covered employees
- Statutes allow for “reasonable suspicion” testing, such as erratic behavior, witnessed drug or alcohol use on the job, or a workplace accident resulting in injury

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

No Discipline for admitted users who seek treatment, stop using

- **Statutes prohibit discipline against a person who tests positive for drugs but agrees to treatment and to stop using (especially illegal drugs)**
- **An employee who is under the influence, which causes an accident resulting in injury, cannot be denied coverage or benefits, unless**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Test confirmation and Review

- Unless the positive drug test has been confirmed by a second test and by a medical review officer.
- All authorized remedial treatment, care and attendance provided by a health care provider to an injured employee before benefits are denied under the drug free workplace provisions of Fla. Stat. must be paid by the carrier or self-insured

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Cutting off Benefits

- **The carrier or self-insured must give reasonable notice to all affected health care providers that payment for treatment, care, and attendance provided to the employee will be denied after a specified date.**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Deemed Termination for Cause

- An employer who disciplines or discharges an employee (or job applicant) in compliance with the drug free workplace provisions of Fla.'s Workers Comp. statute is considered to have terminated “for cause.”
- Employee whose positive drug test result is confirmed is not, by virtue of the result alone, deemed to have a protected “handicap” or “disability” under federal or state law

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Random Tests?

- Truly random drug tests are permitted under the statutes, and disciplinary decisions can be made based on the results, providing they are “truly” random in nature.
- That is, a misbehaving employee cannot be subjected to a “random” drug test based on that misbehavior. Would be deemed discriminatory.
- If the misbehavior can reasonably be suspected to be the result of drug or alcohol use, then a “reasonable suspicion” test may be permissible

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Safety Sensitive Positions

- Public employees in safety sensitive positions who test positive and who enter an employee assistance program must be assigned to a position other than a safety sensitive position. Such action is NOT discipline
- If such a position is not available, employee is placed on leave, and should be permitted to use any paid leave credits before unpaid leave begins

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Safety Sensitive, continued

- An employee who is employed by a public employer in a special risk position can be terminated for the first positive confirmed test result if the drug confirmed is an illicit drug.
- Similarly, such an employee in an assistance program may be assigned to a non-risk position, or put on leave

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Public Employers cannot . . .

- Discharge, discipline or discriminate against an employee on the basis of any prior medical history revealed to the employer pursuant to Fla. Stat. §112.0455
- Discharge, discipline or discriminate against an employee solely upon employee's voluntarily seeking treatment for a drug related problem, if they have NOT previously tested positive, entered an employee assistance program or rehab
- Beware McIntyre v. Seminole County School Board; Lee County School Board v. Flynn; Lee County School Board v. Idelette

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Drug Use Implications Under the ADA

- Are applicants or employees currently using illegal drugs covered by the ADA?
- No. Must be in treatment and NOT using. Otherwise, can be disciplined
- Are alcoholic applicants or employees covered by the ADA?
- No, not if they are still drinking. Must STOP drinking and be in treatment to qualify for ADA protection. Otherwise, can be disciplined

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Disciplining Injured Workers

- Can we discipline employees injured in the work place if their injury was due to failure to follow procedures, ignoring safety rules, or job protocols?
- YES!!!!
- So long as we post and/or publish the rules, procedures, protocols, inform employees of the consequence for failing to follow them, certainly you can discipline such “misconduct”

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Can Discipline Include Denying Benefits?

- **Not usually, at least not medical treatment. Under certain specific circumstances, as previously discussed, benefits can be denied after proper notice to all affected parties – employee, health care providers, treating physicians**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Is This a Good Idea?

- **Not always. If you “reprimand” an employee who breaks the safety rules but doesn’t injure himself, yet suspend or terminate the employee who breaks the same rules but does cause injury, it can be perceived as retaliatory . . . You disciplined them because it cost the employer \$\$\$, not because it was bad behavior**
- **Consistency is the key**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

What Should Scare You?

- Intentional Torts should scare the heck out of you. There is an exception to the Workers Comp. exclusivity rule in Florida, the rule which says ALL workplace injuries are compensated for under the statute, and NOT through civil tort actions

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

What's a Tort(e)?

- A delicate French pastry, or;
- An intentional tort (or legal wrong) occurs when another employee or, worse, a supervisor, deliberately injures a co-worker. In that instance workers comp. benefits are no longer the sole remedy. The employer can be sued civilly for the intentional injury caused by a co-worker

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

How Much Should It Scare You?

- **Statistics from the National Crime Victimization Survey by the Justice Department shows an average of 1.7 million “violent victimizations” occurred in the workplace annually from 1993 through 1999 (percentages among public employers higher)**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

What Is The Cost?

- From lost work time and wages, reduced productivity, medical costs, workers compensation payments, and legal and security expenses run into the *Billions* of dollars, according to the Justice Department

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Preventative Measures

- Pre-employment screening
- Thorough background checks
- A history of drug or alcohol abuse
- Past conflicts
- Past convictions for violent crimes
- Hostile attitude, history of frequent job changes, tendency to blame others
- Belligerence, specific threats, hypersensitivity, fascination with weapons

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Try To Avoid . . .

- **Understaffing**
- **Confusing or ill-conceived job descriptions**
- **Downsizing or reorganization**
- **Labor disputes, poor relations**
- **Poor management**
- **Inadequate security or training**
- **A lack of employee counseling**

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Meet The Challenge to Discipline Effectively

- Know your facts
- Make sure they know the rules
- Make sure the rule relates to the allegations
- Be consistent*
- Assess the reasonableness of the discipline
- Assess the seriousness of the infraction
- Listen to the employee's story
- Provide adequate warning
- Interview any witnesses
- Document, document, document

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

Discharging Tips

- Don't make reference to age, race, gender, religion, nationality, disability, marital or family status, pregnancy, veterans status or *outstanding workers compensation claims*
- Don't make decisions in the heat of the moment
- Don't broadcast decisions to co-workers

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM



FINAL QUESTIONS

FINAL QUESTIONS

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at
WorkSM

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Atlanta • Chicago • Fort Lauderdale • Irvine • New Orleans • San Diego • San Francisco