In certain circumstances, employees may have rights under the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and state Workers' Compensation laws.*

*Be mindful of the provisions of your state’s workers’ compensation laws, leave laws, disability laws, and other applicable laws when evaluating an employee’s illness or injury.
Intersection of Medical and Disability Leave Laws

**Example:** An employee suffers a severe lower back injury at work that incapacitates the employee for four weeks and requires continuing treatment and rehabilitation therapy for several months. It also substantially limits the employee’s ability to stand, lift and walk.

- This will qualify as a serious health condition under the FMLA.
- The employee may also be considered “disabled” under the ADA and entitled to a reasonable accommodation and protection from discrimination.
Workplace Injury: What’s an Employer to Do?

Questions to ask:

- What laws apply to the situation and to this employee?
- Did the employee put the company on notice of the illness or injury?
- What are our notice obligations to the employee?
- How long will the employee be off work?
- What medical questions can the company ask?
- Does the employee return to his or her job?
ADA: An Overview

What are the Key Components?

- Prohibits employers from discriminating against qualified applicants and employees with a disability in applications, hiring, discharge, compensation, and other terms and conditions of employment.

- Requires employers to make reasonable accommodations to allow employees to perform essential job functions.

- Prohibits retaliation against individuals who have opposed unlawful activity under the Act, and interference with the exercise of rights under the Act.
ADA: An Overview (continued)

Who is Protected?

- Qualified individuals with a disability.

Disability:

- A physical or mental impairment that substantially limits one or more major life activities.
- Having a record of such an impairment; or
- Being regarded as having such an impairment.

Qualified Individual:

- Satisfies the requisite skills, experience, education and other requirements of the position and, with or without reasonable accommodation, can perform the essential functions of the position.
Covered employers?

- Employers with 15 or more employees during the current or preceding calendar year.
FMLA: An Overview

What are the Key Components?

- Covered employers must provide eligible employees up to 12 weeks of unpaid leave per year for specific reasons, including but not limited to the employee’s own serious health condition.
  - The leave can be taken all at once, over periods of time, or on an intermittent basis.
  - The employer must restore employees to the same or equivalent position.
  - The employer provide continuation of insurance benefits to employees on leave.
- Prohibits retaliation against because the individual has opposed unlawful activity under the Act, and prohibits interference with the exercise or rights under the Act.
Who can take FMLA Leave?

- Employees with a “serious health condition,” among other categories of employees enumerated in the statute.

- A serious health condition is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.
Who is covered?

- Employees who have worked for their employer at least 12 months and have worked at least 1,250 hours in the 12 months preceding the leave, if there are at least 50 employees within 75 miles of the employee’s worksite.

- Employers with 50 or more employees within a 75-mile radius for at least 20 weeks during the current or preceding calendar year.
Workers’ Compensation Laws: An Overview

What are the Key Components?

- State workers’ compensation laws generally require employers to carry insurance for wage replacement, medical expenses, and other benefits for employees who suffer on-the-job injuries or occupational illness.
- Many state laws prohibit employers from harassing, discharging or retaliating against an employee for exercising his or her rights under the law.

Who is Protected?

- Generally all employees of an employer are protected under these laws, although some state laws exclude certain categories.
  - Be aware of the intricacies of your state’s laws.
Workers’ Compensation Laws: An Overview (continued)

Covered Employers?

- Because each state has its own system, employer coverage varies. Generally workers' compensation laws will apply to all employers with one or more employees, some have an exception for small employers with a small number threshold number of employees.
How Are The Laws Enforced?

- **ADA**: Equal Employment Opportunity Commission (EEOC)
- **FMLA**: Department of Labor Wage and Hour Division
- **Workers’ Compensation Laws**: State Workers’ Compensation Commissions
What Are The Employer’s Notice Requirements?

- **ADA:** EEOC posting, certain notice requirements for wellness programs.

- **FMLA:** General, Eligibility, Rights & Responsibilities, and Designation Notices.

- **Workers’ Compensation:** Many states have posting requirements.
What Are The Employee’s Notice Requirements?

- **ADA:** Generally, an employee must request a reasonable accommodation (which can take many forms).

- **FMLA:** Requirements vary depending upon whether leave is foreseeable or unforeseeable.

- **Workers’ Compensation:** Typically employees must provide notice of workplace injury or illness within a certain period of days.
What Medical Inquiries Are Permitted?

- **ADA:** For current employees, inquiries and/or a medical examination are permissible where “job-related and consistent with business necessity.”

- **FMLA:** Medical certification of the need for the leave, not to exceed the information requested in the Department of Labor (DOL) Medical Certification Form.

- **Workers’ Compensation:** In addition to medical treatment, typically the employer or carrier can require that the employee submit to an independent medical examination or other examination.

  - Medical records must be kept confidential and maintained separately.
What About Light Duty?

**ADA:** An employer may choose to temporarily excuse an employee from performing essential functions and/or place on “light duty,” but need not do so under the ADA. If an appropriate light duty position exists and is vacant, assignment to that position may be a reasonable accommodation if there is no other accommodation.

**FMLA:** Employers cannot require FMLA-eligible employees to perform light duty assignments in lieu of leave.

**Workers’ Compensation:** Some employers maintain “light duty” positions for workers who suffer job-related injuries in order to reduce WC liability.
How Long May An Employee Take Off?

- **ADA:** No mandated leave period, accommodations depend on individual circumstances.

- **FMLA:** Up to 12 weeks of unpaid leave (in 12-month period), all at once or on an intermittent basis.

- **Workers’ Compensation:** Generally there is no mandated leave period, employees will be entitled to wage replacement benefits under state law.
Can An Employee Take Additional ADA Leave After FMLA Leave?

It Depends.

- After FMLA leave is exhausted, leave may continue to be an effective accommodation, however the employer may also provide an alternative accommodation that requires an employee to remain on the job instead of taking additional leave, if the accommodation would be effective and eliminate the need for leave. This will be fact-specific.

- EEOC’s position: blind application of “no-fault policies” (e.g., “6 months and out”) without individualized assessment does not comply with ADA’s reasonable accommodation requirements.
Fitness for Duty/Return to Work Paperwork?

- **ADA:** Permitted as long as the medical examination and inquiry is job-related and necessary to determine whether the employee can perform the essential functions of the job.

- **FMLA:** A fitness-for-duty certification may be a condition of restoring the job of an employee who took FMLA leave for his or her own serious health condition. However, the employer must require the fitness-for-duty certification uniformly of all similarly situated employees.

- **Workers’ Compensation:** Often used or required.
Is the Employee Entitled to Reinstatement to His/Her Position?

- **ADA**: Yes, the employee is entitled to return to the same job unless the employer can demonstrate that holding the position will cause an undue hardship.

- **FMLA**: Yes, to the same or “equivalent” job.

- **Workers’ Compensation**: Often there is no automatic right to reinstatement. Many states prohibit retaliation and/or discrimination because an employee has exercised workers’ compensation rights.
Questions?
Schiff Hardin’s Labor and Employment Group’s new 20-minute podcast covers “New Laws and Lessons for Employers from Trump’s First 100 Days.”

- Will private companies be allowed to offer comp time in lieu of paying time-and-a-half for overtime?
- How employer-friendly will the National Labor Relations Board (NLRB) and Department of Labor be?

To listen in, visit employerlawlandscape.com or schiffhardin.com
Nora Kersten Walsh concentrates on all areas of labor and employment law. Her practice includes counseling and charge and litigation defense on a wide range of issues spanning the employer-employee relationship, including but not limited to hiring, policies and handbooks, leave, accommodations, wage and hour issues, employee reductions and separations, and restrictive covenants. She also has a concentration in affirmative action program preparation and planning, and represents federal contractors in audits and other matters pending before the Office of Federal Contract Compliance Programs (OFCCP).
K.M. Zouhary focuses her practice on employment litigation and pre-litigation counseling. She has represented clients in proceedings in federal and state courts and administrative agencies on matters involving discrimination and harassment claims, whistleblower claims, and claims related to non-compete agreements. In addition, she counsels clients on employment agreements, personnel policies, separation agreements, leave and accommodations, and performance evaluations.