defense UPDATE

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THE INTERPLAY BETWEEN THE FAMILY MEDICAL LEAVE ACT AMERICANS WITH DISABILITIES ACT AND WORKERS' COMPENSATION

By: DIANE M. REINSCH*

Consider the following scenario: One of your clients calls for your advice on terminating an employee. The employee strained his back at work and asked for a couple weeks to recover from the injury. After a few weeks off without any improvement, the employee's doctor recommends surgery. Your client tells you that the employee said that he probably would be off work three to four months. Your client mentions that the employee is not a very good employee and he would just as soon terminate the employee. Your client wants to know what he can do.

This scenario implicates three laws – the Family Medical Leave Act ("FMLA"),[1] the Americans with Disabilities Act ("ADA")[2] and the Iowa Workers' Compensation Act.[3] These statutes quite often overlap, because they address an employee's absence from work due to illness or injury. Determining what to do under one of these statutes can be difficult enough, let alone trying to figure out what to do when they interact with one another. Depending on the circumstances, the application of more than one of these statutes can lead to seemingly inconsistent results. In light of the potential for confusion and the expensive consequences for a wrong decision, it is important that attorneys understand the interplay between these three statutes. The purpose of this article is to give an overview of the different legal requirements of each statute, identify areas where the statutes interact, and identify what facts attorneys need to consider in such circumstances.

I. OVERVIEW

Covered Employers

The first thing that an attorney must determine is whether or not the employer is covered under any of the statutes. The FMLA covers private employers who employ 50 or more employees within a 75-mile radius for 20 or more workweeks in the current or preceding calendar year.[4] All employees who appear on the payroll for the week are counted, including part-time employees, temporary employees, and employees on leave (paid or unpaid) if there is a reasonable expectation the employee will return to work.[5] Employers who employ 15 or more employees for 20 workweeks in the current or preceding calendar year are subject to the ADA,[6] and the Iowa Workers' Compensation Act covers employers who employ only one employee.[7]

A. Eligible Employees

FMLA

Even if an employer is subject to the FMLA, the employee might not be eligible for protection under the statute. An employee is eligible to receive benefits under the FMLA if the employee, as of the date the FMLA leave begins, has worked for the employer for at least 12 months and during the 12 months immediately preceding the date

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* Diane M. Reinsch is an Associate at Lane & Waterman in Rock Island, Illinois. She thanks Stacey L. Hawke, law clerk at Lane & Waterman, for her very able assistance in the editing of this article.
[1] 29 U.S.C. §§ 2601-2654 (2000); 29 C.F.R. §§ 825.100-825.800 (2001).
[2] 42 U.S.C. §§ 12101-12213 (2000); 29 C.F.R. §§ 1630.1-1630.16 (2001).
[3] Iowa Code 85 (2002).
[4] 29 C.F.R. § 2611(2)(B)(ii); 29 C.F.R. § 825.104.
[5] 29 C.F.R. § 825.105(b)-(c).
[6] 29 C.F.R. § 1630.2(e).
[7] Iowa Code § 85.1.

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MESSAGE FROM THE PRESIDENT

Mike Weston

The Iowa Defense Counsel Association is studying the issue of pro hac vice admissions in the State. The IDCA wants to make certain that all lawyers who practice in Iowa comply with the Code of Professional Responsibility. However, an ad hoc study committee chaired by Board Member Lyle Ditmars, of Council Bluffs, has revealed some problems with current practices around the State. As a result, the following is the text of a letter sent to John French, President of the Iowa Trial Lawyers Association; John Riccolo, President of the Iowa Academy of Trial Lawyers; and Alan Fredregill, President of the Iowa State Bar Association. Copies of the letter were sent to the Honorable Louis A. Lavorato, Chief Judge of the Iowa Supreme Court, and the Honorable John A. Nahra, of Davenport, President of the Iowa Judges Association.

RE: **Pro Hac Vice Admissions**

Recently, the Iowa Defense Counsel Association has begun a study of pro hac vice admissions in the State. An ad hoc committee chaired by Lyle Ditmars of Council Bluffs has conducted a survey of the rules of Iowa, the rules of our neighboring states, as well as an informal survey of practitioners around the State to determine whether these rules are being followed.

Iowa Court Rule 31.14 governs the process for obtaining a pro hac vice admissions. As you are aware, an attorney admitted to practice in the State other than Iowa must:

• File the written appearance of a resident attorney admitted to practice in the State of Iowa upon whom service may be made in all matters; and

• File with the Clerk a verified statement by which the attorney seeking admission agrees to submit to and comply with all provisions and requirements of the Iowa Code of Professional Responsibility for Lawyers. (emphasis added) Iowa Court Rule 31.14(1).

It is our observation that this rule is not universally enforced around the State. Specifically, there are instances when provisions of the Iowa Code of Professional Responsibility are not followed by lawyers from other states who have been admitted. The most obvious departure from our rules is in the area of advertising. In certain instances, the mandates of 32.DR 2-101 et. seq. are not being followed. Certain Courts do not follow the requirements set forth in the Rule before granting pro hac vice admission.

In studying this issue, the Iowa Defense Counsel Association does not seek to exclude attorneys licensed to practice in other jurisdictions from practicing in our State. Certainly, clients who are parties to litigation have the right to choose counsel. However, pro hac vice admission in the courts of the State of Iowa is a privilege and not a right. The requirement that especially admitted attorneys follow the Iowa Code of Professional Responsibilities serves the purpose of ensuring Iowans and Iowa litigants that the important rules established by the Iowa Supreme Court are followed. The public deserves this protection in all instances and those attorneys who practice in our State should be required to comply.

We would be interested in hearing your views on this issue, so that all interested members of the trial bar can work together to ensure that the public is served by attorneys who comply with the mandate of our Supreme Court. Please direct any comments or questions that you might have to Lyle Ditmars of Council Bluffs or the undersigned.

Thank you for your consideration of this important issue.

Very truly yours,

J. Michael Weston

J. Michael Weston
President, Iowa Defense Counsel Association

Similarly, we would like to hear from the members of the Association on this important issue. Feel free to direct any comments to Lyle W. Ditmars, Peters Law Firm PC, 233 Pearl Street, P.O. Box 1078, Council Bluffs, IA 51502-1078, Phone: (712) 328-3157, Fax: (712) 328-9092, E-mail: lyleditmars@hotmail.com or me. We will keep you abreast of our work in this regard.

ADMISSIBILITY OF PREADJUSTED VERSUS POST-ADJUSTED MEDICARE/MEDICAID BILLS

By: Marion L. Beatty, Decorah, Iowa

The Iowa Supreme Court has not yet answered the question of whether a plaintiff receiving Medicare or Medicaid benefits is entitled to recover the entire face amount of medical bills incurred, or the amount that Medicare and Medicaid actually paid on the bills.

The plaintiff usually asserts that he or she is entitled to put into evidence the entire amount of the bill before any adjustment by Medicare or Medicaid. The defense argues that the plaintiff should only be able to put into evidence the amount actually paid on the bill, as the plaintiff is not responsible for any more than the amount accepted by the care provider and paid by Medicare or Medicaid.

I. Does the Collateral Source Rule Apply to Medicare and Medicaid Adjustments?

II. Restatement of the Law, Torts Second, §920A(2) (definition).

Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

III. Restatement of the Law, Torts Second, §920A, comment (b), Common Law Rationale.

Benefits from collateral sources. Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff s injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself. If the benefit was a gift to the plaintiff from a third party or established for him by the law, he should not be deprived of the advantage that it confers. The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him. One way of stating this conclusion is to say that it is the tortfeasor's responsibility to compensate for all harm that he causes, not confined to the net loss that the injured party received. Compare §924, comment c (recovery for harm to earning capacity through plaintiff was on vacation), §914A (recovery for damage to earning capacity ordinarily not reduced by amount of income tax that was not imposed).

Perhaps there is an element of punishment of the wrongdoer involved. (See §901). Perhaps also this is regarded as a means of helping make the compensation more nearly compensatory to the injured party. (Cf. §914A, Comment b).

Comment c to §920A provides that the following collateral benefits are not to be subtracted from the plaintiff's recovery:

1. Insurance payments whether made by the plaintiff or third party.
2. Employment benefits.
3. Gratuities.
4. Social legislation benefits.

IV. 668.14(1) Evidence of previous payment or future right of payment:

In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual

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OBSERVATIONS FROM THE BENCH

By: Thomas J. Shields, United States Magistrate Judge, Southern District of Iowa

Lawyers have not disappointed me. In the nearly three years since I have been a full-time magistrate judge, lawyers with whom I have come in contact have upheld the longstanding tradition of procrastination. In fact, some practitioners have made procrastination an art form.

I speak from experience and knowledge. I was one of the greatest procrastinators in nearly 26 years of practice. I am certain that I infuriated and befuddled any number of judges throughout Iowa as I consistently fired off motions on the eve of deadlines; made ex parte phone calls on the day of deadlines; and cajoled fellow lawyers into joining with me in last-minute stipulations to stave off some impending doom.

Now that the “shoe is on the other foot” so to speak, I can appreciate why many of my motions and requests were denied. At the time I took it as a personal affront that a judge would refuse to grant what I thought was preeminently a fair request; the denial of which only made life only more miserable for me.

Notwithstanding my own prior transgressions, and what I have observed from over six years on the bench, there are some lessons that have become worth memorializing and perpetuating.

One of the things that I have tried to keep in perspective as I rule on motions on a daily basis is that I too was once a supplicant before a number of different courts. Consequently, I try to put myself in the position of the practitioner who is making a request to the court so that if the motion is denied, I can truthfully and honestly say that the resulting ruling was because it was right and not because I took the easiest course.

A very bright person, and I cannot provide a name for attribution, said some time ago, “Your emergency is not my emergency.” I wish I had heard that statement when I was a young lawyer, because it might have had a profound impact upon how I viewed the practice of law. Putting out brush fires was an analogy I was fond of using in response to questions as to what I was doing in my practice. Looking back now on those harried days, I see that description was more accurate than I even then realized.

I digress at this point only to underscore the fact that court emergencies are rare. The genesis is often lawyer-driven and lawyer-made. Judges have schedules and other obligations. This is especially true in federal court where the district judges and the magistrate judges are far fewer in number than state court judges, and although having limited jurisdiction, nonetheless see a wide range of cases.

My own particular circumstance is somewhat different, although I think nonetheless typical of what magistrate judges in Iowa see on a daily basis. Very often there are numerous criminal hearings each and every day. Those hearings range from initial appearances to preliminary hearings to detention/ bond hearings to arraignments. Added to that are, by consent, guilty pleas in felony cases and hearings on various criminal motions, and conducting criminal pretrial conferences.

Intertwined with that is ruling on civil motions, scheduling hearings in civil cases upon motions, and conducting jury trials. No day is like the day before, and hopefully each day allows time for the handling of matters that come up at the last minute.

I encourage lawyers to call when a problem arises, especially in discovery matters, rather than to simply file a motion, or adjourn proceedings, and then file motions. Many times when all the attorneys are on the phone together, and everyone is required to verbalize the nature of the dispute, resolutions can be worked out quite quickly, saving substantial time and expense in filing motions and resistances, and also freeing the court from having to wade through the pleadings and, in many cases, schedule a hearing.

In this context let me direct your attention to some practical aspects that will, I think, greatly assist you in practicing in federal court. There seems to be, and has been for some time, a perception that practicing in federal court is more onerous and more difficult than litigating in state court. Having litigated in both courts over a quarter century, I think I am in a position to

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BOB WATERMAN

By: David M. Elderkin

Historians Will and Ariel Durant at one time wrote a book "The Lessons of History." In it they trace the history of mankind down through the mists, narrating all of its perceived faults and mistakes, but finally at the end of the book, they make the statement "But who speaks for the goodness of mankind?" The same thing might well be said about that special breed of mankind, the lawyers. In recent years the age old hostility toward lawyers has developed into a crescendo of vilification. As with mankind in general, some of it is deserved and it can be said that the profession has not always done well with its fiduciary responsibilities.

On the other hand, the critical importance of the rule of law to this nation's economic and political well being and the lawyer's indispensable role in implementing it is little understood and even less appreciated. To paraphrase Durant's comment "Who speaks for the goodness of lawyers and their contribution to freedom and justice under law?"

There are many lawyers that any author could use as an example, but from my point of view, Bob Waterman might well head the list. His history of accomplishments, to his profession, to his country in war time, to his civic work, his hospital work and to his church are simply too numerous to list in this writing. Professionally, he was a member of the Scott County, Iowa State and American Bar Associations, a Fellow in the American College of Trial Lawyers, serving on its Board of Regents. He was a member of the International Society of Barristers, International Association of Defense Counsel, Past President of Iowa's Defense Counsel, Chair and Lecturer for various Bar associations and legal societies.

In my own case, he was a friend for many years. I tried cases with him and against him. We worked together in the Iowa Academy of Trial Lawyers and in the American College of Trial Lawyers. He was an aggressive and tough trial lawyer, but had the unusual capacity of trying difficult cases without giving offense and without making enemies.

In recent years, Bob and I and our wives sought refuge from Iowa winters in Naples, Florida. We always had a few drinks and played more than a little golf. His golfing was like his law practice. He was good. This year we were in the process of discussing and handling a business matter and on the day of his death, I was expecting his telephone call. The next morning I picked up the phone to call him when a phone call came from Kitty telling us about his death. Shortly after a call came from Bob Van Vooren filling us in on the details.

At my age, I have lost many friends and grieved over each one. But I don't remember any death shocking me to the extent that Bob's did and I must admit that I shed more than a few tears. For a vigorous and apparently healthy man, so important to his family, his firm, his profession and his community to have died while riding a bicycle on a private driveway is incredible. Yet -

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LAW SCHOOL PROGRAM COMMITTEE UPDATE

The Iowa Defense Counsel sponsored and conducted a mini-mock trial at the University of Iowa on February 22, 2003 at the Department of Orthopedics. Both the residents of the University of Iowa medical school and the law students from the law school participate in this unique program that brings the two disciplines together to learn about the dynamics of a medical malpractice trial. Judge Michael J. Moon from Marshalltown, Iowa handled the judging duties and trial attorneys: Sharon Soorholtz Greer and Joel Greer of Marshalltown, Iowa took the roles as opposing attorneys. Two faculty members of the Orthopedic Department, Dr. Joseph Buckwalter and Dr. Jose Morcuende, assumed the roles of the expert witness. This opportunity allows students to see the legal process first-hand and also involves 4 law students and 4 medical residents to serve as jurors. In addition, to the trial demonstration, there is a brief lecture about trial techniques for lawyers and for potential witnesses or parties and the "student-jurors" deliberate.

The mini-mock trial has been given several times both at the University of Iowa and at Drake University as a service of the Iowa Defense Counsel Law School Program Committee. The Iowa Defense Counsel has over 375 active members consisting of both attorneys and claims professionals who handle the claims or defense of civil lawsuits.

A PRIMER ON THE WORKERS' COMPENSATION COMMISSIONER'S WEBSITE

By: Peter M. Sand

The Commissioner's website has received notable improvements during the first year of Commissioner Trier's tenure. If you practice in workers' compensation, I suggest you peruse the website at: www.iowaworkforce.org/wc/index.html. Here are some of the highlights you will see.

FORMS: A hotlink will take you to an acrobat reader version of all of the forms required by the Commissioner's office, including first report of injury, form 2A, petition, settlement documents, etc.

CONTACT #S: You can obtain direct dial numbers for almost all personnel in the Commissioner's office, rather than having to dial through the switchboard, which often entails a long wait on hold.

DOCKET: You can access the Commissioner's docket, and view it several different ways, such as by attorney or by venue. Parties cannot yet choose trial dates online and lock them in. It is still necessary to call the docket administrator, Marianne Gilliam, and lock in your trial or mediation date. Hopefully some day soon parties will be able to lock in dates online without needing personal confirmation from the Commissioner's office. But at least a practitioner can compare calendars with opposing counsel and narrow down the possibilities before calling the Commissioner's office. In addition, the author occasionally checks the docket listings for himself, on the off chance that a matter has been assigned for hearing and for whatever reason notice has not been received.

NEWS: The Commissioner posts news of note to workers' compensation practitioners. Here are three notable recent items:

MEDIATION: Commissioner Trier has decided to continue offering free mediation to parties with workers' compensation disputes. Mediations are held only in Des Moines. Parties wishing to mediate no longer file an application for mediation and a dispute resolution conference report. Parties should simply dial up the docket administrator and obtain a date for mediation that will be confirmed by mail. The parties are asked to bring a dispute resolution conference report to mediation.

APPEAL BRIEFS: Commissioner Trier has decreed that one extension of appeal brief deadlines will be granted, if a motion for extension is made prior to the deadline for the brief. Further extensions will not be allowed absent extraordinary circumstances.

MULTIPLE INJURY DATES: Commissioner Trier has instituted a new rule allowing, and encouraging, workers with more than one claim to file one single petition for all of their various claims, instead of one petition for each date that could potentially be considered a date of injury. The rule does not require all injuries to be made on one petition, however, and one wonders if the long-standing habits of attorneys will change. The new rule is 876 IAC 4.6, and took effect 1/1/03.

APPEAL SUMMARIES:
Commissioner Trier picks from his appeal decisions those he considers important agency precedents, and posts them in this special part of the website. This is a good place to obtain the latest law from the Commissioner's office. Cases posted here clearly show the ways in which Commissioner intends to hew to past agency precedents, and the ways in which he intends to set a different course. Here are four notable recent additions:

Geary v. Donaldson Co., file 1282930: Employers have complained bitterly about claims of tinnitus(ringing in the ears). The Supreme Court has ruled that tinnitus is compensated with industrial disability, and compensation is not limited to scheduled hearing loss (*Ehteshamfar v. UTA Engineered Systems,* 555 N.W.2d 450 (Iowa 1996)). This has made hearing loss claims very unpredictable and unmanageable for plant owners. In *Geary*, Commissioner Trier awarded only 10% industrial disability to a worker with a 19% rating due to tinnitus. The Commissioner stated that tinnitus claims will not be awarded more than a modest amount of disability unless the tinnitus leads directly to wage loss.

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the leave begins, the employee worked at least 1,250 hours.[8] The employer is obligated to provide eligible employees 12 weeks of unpaid leave in a 12-month period for (1) a serious health condition of the employee, (2) to care for a spouse, parent or child with a serious health condition, or (3) for the birth or adoption of a child or placement of a child with the employee for foster care.[9] The employee is entitled to leave if the employee is unable to perform the essential functions of her job.[10] While on leave, the employer must continue the employee's group health benefits under certain conditions[11] and when the employee returns from leave, the employer must reinstate her to the same or equivalent position.[12] Employers are not required to reinstate key employees[13] if to do so would cause the employer substantial and grievous economic injury.[14]

ADA

Unlike the FMLA, the ADA has no length of service requirement and it protects not only employees, but applicants as well. The ADA requires an employer to provide a reasonable accommodation to an employee or applicant with a known disability or mental condition who otherwise is a qualified individual with a disability. A qualified individual with a disability is one who, with or without a reasonable accommodation, can perform the essential functions of employment.[15] An employer may not discriminate against such an individual whether it be in the hiring, firing, promotion of employees, compensation and benefits, job training, or any other employment term or condition[16], unless the employee's disability imposes a direct threat to her own safety or the safety of others[17] or the accommodation would impose an undue hardship on the employer. [18]

An employee's protection under the ADA or reinstatement under the FMLA turns on whether she can perform the essential functions of her job. Essential functions are those that are fundamental to the job at issue. Tasks that are marginal or merely incidental to a job are not essential.[19] Occasionally, the employer and employee disagree what functions are fundamental to the job. To avoid potential disputes, the attorney should encourage employers to write job descriptions for each position at the employer's business. While it can be a tedious and time-consuming task, job descriptions are invaluable in determining if the employer must reinstate the employee and/or offer an accommodation.

Workers' Compensation

Workers' compensation benefits are available to an employee who incurs an injury that arises out of or in the course of employment.[20] Such injuries include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires the employee's presence and subjects the employees to dangers incident to the business.[21] For such injuries or illnesses, the employer must pay lost wages.[22] While there is no job protection as under the FMLA, an employer cannot retaliate against an employee if she exercises her right to benefits under the Iowa Act.[23]

II. LEAVE ENTITLEMENT AND PROTECTIONS

A. Illness and Injury.

One or more of these statutes may be implicated when an employee becomes ill or injured. Generally, it is not difficult to determine if an illness

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[8] 29 C.F.R. § 825.110(a).
[9] 29 C.F.R. § 825.112(a).
[10] 29 C.F.R. § 825.115.
[11] 29 C.F.R. § 825.209.
[12] 29 C.F.R. § 825.214.
[13] "Key employee" is defined as a salaried employee who is among the highest paid ten percent of employees working within 75 miles of the worksite where the employee is located. 29 C.F.R. § 825.217.
[14] 29 C.F.R. § 825.216(c). There is no hard and fast rule to determine "substantial and grievous economic injury," but the regulations offer some guidance. *See* 29 C.F.R. § 825.218.
[15] 29 C.F.R. § 1630.2(m). A "reasonable accommodation" is any modification or adjustment to the job that enable the employee to perform the essential functions of her job. *See* 29 C.F.R. § 1630.2(o)(1).
[16] 29 C.F.R. § 1630.4.
[17] C.F.R. § 1630.15(b)(2).
[18] 29 C.F.R. § 1630.9(a). An "undue hardship" is any action requiring significant difficulty or expense in light of certain factors. See 29 C.F.R. § 1630.2(p).
[19] 29 C.F.R. § 1630.2(n)(1).
[20] Iowa Code § 85.3(1); *Briar Cliff College v. Campolo*, 360 N.W.2d 91, 93 (Iowa 1984).
[21] Iowa Code § 85.61(7).
[22] Iowa Code § 85.3.
[23] *See, e.g., Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, (Iowa 1990); *Springer v. Weeks and Leo Co., Inc.*, 429 N.W.2d 558 (Iowa 1988).

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or injury occurred on the job. Most work-related illnesses or injuries qualify as a "serious health condition" under the FMLA. Nonetheless, the attorney should not assume that a work-related illness is a serious health condition. The FMLA defines a "serious health condition" as an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.[24] It is important to determine if a work-related injury qualifies as a serious health condition, because if it does not, the employer can require the employee to do light-duty work to reduce workers' compensation benefits. However, if the work-related injury also qualifies as a serious health condition, an employee is permitted, but not required to work light-duty.[25] As a result, the employee may no longer qualify for workers' compensation benefits, but the employer must permit the employee to continue on unpaid FMLA leave and reinstate the employee to the same or equivalent position.[26]

A work-related injury that is a serious health condition may also be a disability. Therefore, the attorney's analysis of the injury must take into consideration the definition of a disability under the ADA. A disability includes any illness or injury that substantially limits a major life activity.[27] In determining whether a medical condition substantially limits a major life activity, the employer can take into consideration mitigating factors.[28]

In *Toyota Motor Mfg. (Kentucky) v. Williams*, the Supreme Court recently addressed the issue of what substantially limits a major life activity.[29] In a unanimous decision, the Court held that a person is substantially limited in the major life activity of performing manual tasks if he has an impairment that "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives," such as "household chores, bathing, and brushing one's teeth."[30] The Court found that the plaintiff, whose carpal tunnel syndrome and tendonitis limited her in assembly-line work, did not substantially limit her in performing manual tasks that are of central importance in most people's daily lives.[31] The Court noted that the ADA establishes a demanding standard for establishing that an individual has a disability and, that in order to be substantially limiting, an impairment must be severe and either permanent or long-term.[32] Although impairments must be permanent or long term, not every permanent injury will qualify as a disability. For instance, injuries that are classified as a "permanent disability" for workers' compensation purposes will not necessarily qualify as a disability under the ADA.[33] Workers' compensation uses different standards to evaluate an employee's condition. Consequently, the employer should not rely on workers' compensation determinations in making its decision to return the employee to work.

Consider the scenario at the beginning of this article. The employee has a work-related injury because she strained her back while on the job. Since she was off the job for more than three consecutive days and she was under the treatment of a physician, she more than likely had a serious health condition, but she probably does not have a disability because the back strain probably does not substantially limit her major life activities. The employee would be eligible for workers' compensation benefits and unpaid leave under the

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[24] 29 U.S.C. § 2611(11). The regulations expand on this considerably, defining a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves: (1) inpatient care including a related period of incapacity; (2) continuing treatment that involves a period of incapacity of more than three consecutive calendar days and any subsequent treatment or period of incapacity for the same condition that involves treatment two or more times or one treatment session that results in a regimen of continuing treatment; (3) incapacity due to pregnancy or prenatal care; (4) incapacity or treatment for a chronic serious health condition; (5) incapacity due to a permanent or long term condition; (6) absence for multiple treatments 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 days in the absence of medical intervention or treatment, such as cancer. 29 C.F.R. § 825.114.

[25] 29 C.F.R. § 825.220(d).

[26] 29 C.F.R. § 825.702(d)(2).

[27] 29 C.F.R. § 1630.2(g).

[28] *See Sutton v. United Air Lines, Inc*. 527 U.S. 471, 482 (1999) (holding that the evaluation of whether someone was disabled was made after the use of any mitigating devices.); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (holding that because medication reduced the plaintiff's blood pressure to a level that did not significantly restrict his major life activities, he was not a person with a disability); *Spades v. City of Walnut Ridge*, 186 F.3d 897 (8th Cir. 1999) (holding a police officer with depression was not an individual with a disability where medication and counseling allowed him to function without limitation).

[29] 122 S. Ct. 681 (2002).

[30] *Id*. at 691, 693.

[31] *Id*. at 694.

[32] *Id*. at 691.

[33] *See, e.g., Dush v. Appleton Electric Co.*, 124 F.3d 957 (8th Cir. 1997) (holding that an employee is estopped from asserting total disability and then claiming to be a qualified individual with a disability under the ADA). *Cf. Robinson v. Neodata Serv. Inc.* 94 F.3d 499 (8th Cir. 1996) (holding that an employee may claim total disability for non-ADA purposes and pursue an ADA claim).

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FMLA, but she would not be protected under the ADA. On the other hand, if after surgery, the employee is permanently restricted to lifting a few pounds or cannot walk or stand for long periods, the employee may be protected by the ADA.[34] The employer would then have to provide a reasonable accommodation. However, the employer needs to determine if the employee is receiving continuing treatment during her recovery period from surgery, because if not, she may not be protected under the FMLA.

B. Notice Requirements.

The employer has certain notice requirements under the FMLA, which it does not have under the ADA or workers' compensation. Generally, an employee who wants to take leave must notify the employer 30 days in advance of the leave, if a condition is reasonably foreseeable, otherwise the employee must notify the employer as soon as practicable.[35] The employer has a duty to designate absences as FMLA leave and give notice to the employee of her rights.[36] This becomes difficult when the employee does not specifically state she wants to take FMLA leave. The employer's duty is triggered if the employer knows that the employee is ill or injured and knows that the employee qualifies for FMLA leave and protection.[37] Employers should have employees explain the reason for the leave so they can determine if it qualifies as FMLA leave. Once the employer knows the request qualifies for FMLA leave, it needs to designate the leave as such. While the Supreme Court recently struck down a FMLA regulation penalizing employers who failed to designate the leave, it did not invalidate the regulation requiring the employer to notify employees that their leave will be considered FMLA leave. [38] The Court left open the possibility that an employee would be entitled to more than 12 weeks of leave, if an employee can show prejudice as a result of the employer failing to notify the employee that the leave has been designated as FMLA leave. Therefore, attorneys should strongly encourage employers to continue to designate FMLA leave, as notice is still one of the employee's rights under the FMLA.

If the employer does not find out that the leave is FMLA qualifying until after the employee begins the leave, the employer may retroactively designate leave as FMLA leave as soon as the employer learns it qualifies.[39] However, the employer must designate the leave before the employee returns to work, unless the employer did not learn the condition was a serious health condition until after the employee returned to work.[40]

The FMLA allows the employer to designate, or an employee may elect to substitute, paid vacation, personal, or medical or sick leave for unpaid FMLA leave.[41] Therefore, if an employee has ten days of accrued sick leave, the employer can designate those ten days of sick leave to run concurrently with the first ten days of FMLA leave. Similarly, if an employee is on workers' compensation and is also eligible for FMLA leave, the employer may require the workers' compensation leave and the FMLA leave to run concurrently as long as the employer appropriately gives notice and designates the leave.[42] However, an employer cannot require an employee on workers' compensation leave to count it against both FMLA and sick leave, because the workers' compensation leave and the sick leave are both paid leave.[43]

C. Medical Information.

At times it is difficult to know whether an employee's medical condition is covered under the FMLA and/or the ADA. Both statutes permit an employer to obtain medical information regarding the employee's condition. The FMLA does not permit an employer to speak directly to the employee's health care provider even with the express permission of the employee.[44] Rather, if the employee requests FMLA leave and the

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[34] *See, e.g., Wheaton v. Ogden Newspapers, Inc.*, 66 F. Supp. 2d 1054 (N.D. Iowa 1999) (Denying the defendant's motion for summary judgment, the court held that a factual issue exists as to whether the plaintiff's back impairment substantially limits her major life activities of lifting and standing. The court noted that while the Eighth Circuit has held that a 25-pound lifting restriction will not, by itself, be sufficient to constitute a disability, it has never been presented with the question of whether an individual with an unconditional ten-pound lifting restriction is disabled within the meaning of ADA.).
[35] 29 C.F.R. § 825.302(a).
[36] 29 C.F.R. § 825.301(c).
[37] 29 C.F.R. § 825.208(a).
[38] *See Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1161, 1163 (2002).
[39] 29 C.F.R. § 825.208(d).
[40] 29 C.F.R. § 825.208(e).
[41] 29 C.F.R. § 825.207(a).
[42] 29 C.F.R. § 825.207(d)(2).
[43] *Id.*
[44] 29 C.F.R. § 825.307.

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employer questions the need for the leave, the employer may require a medical certification of the serious health condition from the employee's treating health care provider.[45] The employer is restricted to obtaining the information set forth in the form provided by the Department of Labor.[46] This information pertains to the verification that the employee has a serious health condition and whether intermittent or part-time work is medically necessary.[47] If an employer questions the information in the certification or wants a clarification, it cannot speak directly to the employee's health care provider.[48] Rather, with the permission of the employee, the employer's own health care provider may contact the employee's health care provider for any clarifications.[49] However, if the employee is concurrently receiving workers' compensation benefits, the FMLA permits the employer to contact the employee's health care provider directly when workers' compensation permits employers to contact the employee's health care provider.[50] The employer can also obtain a second opinion at its own expense.[51] If the opinions differ, the employer may request a third binding opinion, at the employer's expense, but the employer cannot use any health care provider it regularly uses.[52]

Under the ADA, an employer may require an employee to submit sufficient documentation from her health care provider to substantiate that the employee indeed has a disability and that an accomodation is necessary to enable the employee to perform the essential functions of her job.[53] The employer cannot request the employee's entire medical records, because the records will undoubtedly contain information unrelated to the alleged disability.[54] The documentation is sufficient if it describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities, and substantiates why the requested reasonable accommodation is needed.[55] (Job descriptions, therefore, should not only identify the essential functions of the job, but also define what the essential functions require, i.e. lifting 40 lbs, bending, stooping, etc.) The employer may make disability inquiries and/or require medical examinations only when they are job-related and consistent with business necessity.[56] Generally, these inquiries are job-related and consistent with business necessity if the employer has a reasonable belief that the employee is unable to perform the essential functions of the job,[57] or it is necessary to determine what reasonable accommodation is needed,[58] or the employee poses a direct threat because of the medical condition.[59]

D. <u>Extended and Intermittent Leave</u>

Extended Leave. It is important to determine if an employee falls under one or more of the statutes because it will determine how the employer treats the leave. If our employee with the bad back asks for five weeks off, and the attorney determines that the employee is covered under the FMLA and ADA, the employer may not require the employee to accept a reasonable accommodation that would keep the employee on the job as this would violate the employee's right to return to the same or an equivalent position under the FMLA. Once the employee has exhausted her FMLA leave, the employer must consider whether the employee is entitled to additional leave as a reasonable accommodation. Unlike the FMLA, the ADA does not impose a limitation on the length of leave as long as the leave does not impose an undue hardship. A request for more than 12 weeks of leave is not

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[45] 29 C.F.R. § 825.305(a).
[46] 29 C.F.R. § 306(a)-(b)
[47] 29 C.F.R. § 825.306(b).
[48] 29 C.F.R. § 825.307(a).
[49] *Id.*
[50] 29 C.F.R. § 825.307(a)(1).
[51] 29 C.F.R. § 825.307(a)(2), (e).
[52] 29 C.F.R. § 825.307(c).
[53] U.S. Equal Employment Opportunity Commission: Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), EEOC Notice 915.002, ¶ 7 (July 27, 2000), www.eeoc.gov/docs/guidance-inquiries.html [hereinafter EEOC Guidance on Disability-Related Inquiries].
[54] *Id.* ¶ 10.
[55] *Id.* ¶ 5.
[56] *Id.* ¶ 7.
[57] 29 C.F.R. § 1630.14(c).
[58] EEOC Guidance on Disability Related-Inquiries, note 53, ¶ 5.
[59] *Id.*; 29 C.F.R. § 1630.2(r).

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automatically unreasonable under the ADA. Although the ADA does not specifically list paid or unpaid leave as a reasonable accommodation, the EEOC and courts have concluded that extended leave is a reasonable accommodation.[60] However, the EEOC and courts disagree as to whether an indefinite leave of absence is a reasonable accommodation. In its Enforcement Guidance on Reasonable Accommodation, the EEOC states indefinite leave is a reasonable accommodation, unless the employer is able to show that it would cause undue hardship.[61] On the other hand, courts have found indefinite leave to be inherently unreasonable.[62]

Intermittent or Reduced Leave. In certain circumstances, an employee may want only a few hours or days a week for ongoing treatment. Both the ADA and FMLA provide for intermittent or reduced leave schedules.[63] Under the FMLA, the employer is required to provide such leave if the employee is requesting it for her own serious health condition or to care for a family member with a serious health condition, that is medically necessary, and the condition is best accommodated through intermittent leave or a reduced leave schedule.[64] Where the leave is foreseeable, the employee must attempt to schedule the leave at a time that will not disrupt the employer's business. The employer may transfer the employee for the duration of the leave to an alternative position with equivalent pay and benefits, for which the employee is qualified and which better suits her reduced hours.[65] The employer must maintain the employee's existing level of group health coverage during the leave, provided that the employee pays her share of the premiums.[66]

Even if the employer does not provide reduced schedules for other employees, intermittent leave or a reduced schedule is a form of reasonable accommodation under the ADA, as long as the reduced schedule does not create an undue hardship for the employer.[67] If there is undue hardship, the ADA requires the employer to consider reassigning the employee to a vacant position for which the employee is qualified and which would allow the employer to offer a reduced schedule without undue hardship.[68] An employee receiving a reduced schedule as a reasonable accommodation is entitled only to the benefits that other part-time employees receive.[69]

E. Benefit and Job Protection.

Group Health Benefits. The FMLA provides that employers maintain group health benefits on the same terms as if the employee had not been on leave.[70] The employer can require the employee to continue to pay her share of the premiums.[71] The employer is not responsible for maintaining any other benefits while the employee is on FMLA leave unless the employer has an established policy for providing other benefits when employees are on other forms of leave.[72] If an employee elects not to continue her benefits while on leave, the employer must reinstate the employee to benefits on the same terms as prior to taking the leave without any qualifying period or

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[60] *See* U.S. Equal Employment Opportunity Commission, EEOC Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice 915.002, ¶ 16, (October 17, 2002), www.eeoc.gov/docs/accommodation.html [hereinafter EEOC Guidance on Reasonable Accommodation]; *Pickens v. Soo Line R.R.*, 264 F.3d 773 (8th Cir. 2001) (acknowledging that leave is a form of reasonable accommodation, but finding it excessive that an employee took leave 29 times in a 10-month period, thus failing to show any regularity in his attendance); *Haschmann v. Time Warner Entertainment & Co.*, 151 F.3d 591 (7th Cir. 1998) (holding that keeping a job open for two to four weeks while an employee was on leave was a reasonable accommodation); *Rascon v. US WEST Comm. Inc.*, 143 F.3d 1324 (10th Cir. 1998) (holding that four months leave to treat post-traumatic stress disorder was a reasonable accommodation).

[61] EEOC Guidance on Reasonable Accommodations, *supra* note 60, ¶ 16; 29 C.F.R. § 1630.2(p).

[62] *See e.g., EEOC v. Yellow Freight Sys. Inc.,* 253 F.3d 943 (7th Cir. 2001) (en banc) (holding a request for unlimited sick leave, without being penalized, is unreasonable as a matter of law); *Walsh v. United Parcel Serv.*, 201 F.3d 718 (6th Cir. 2000) (When an employer has already provided a substantial amount of medical leave, any additional leave, with no clear prospects for recovery, is not a reasonable accommodation. The court found that the plaintiff, in effect, was requesting indefinite leave.); *Mitchell v. Washingtonville Cert. Sch. Dist.*, 190 F.3d 1 (2d Cir. 1999); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995).

[63] 29 C.F.R. § 825.203(a); EEOC Guidance on Reasonable Accommodations, *supra* note 68, ¶ 22.

[64] 29 C.F.R. § 825.203(b)-(c).

[65] 29 C.F.R. § 825.204(a)-(c).

[66] 29 C.F.R. §§ 825.209, 825.210.

[67] EEOC Guidance on Reasonable Accomodation, *supra* note 60, ¶ 22; 29 C.F.R. § 1630.2(o)(2)(ii); *see also Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 172 (1st Cir. 1998) (holding that an employee's request to return on a part-time schedule for four weeks, after a medical absence of a year, was an appropriate request for reasonable accommodation). *Cf. Hatchett v. Philander Smith Coll.*, 251 F.3d 670 (8th Cir. 2001) (holding that a part-time schedule may be a reasonable accommodation in appropriate circumstances, a four-hour work day was inappropriate for a business manager because she could not complete her essential functions in that time period); *Treanor v. MCI Telecomm. Corp.* 200 F.3d 570 (8th Cir. 2000) (holding part-time work schedule is a reasonable accommodation, but an employer does not have to create a new part-time position where none existed).

[68] EEOC Guidance on Reasonable Accommodation, *supra* note 60, ¶ 23.

[69] *Id.*; 29 C.F.R. § 825.702(c)(1).

[70] 29 C.F.R. § 825.210(a).

[71] *Id.*

[72] 29 C.F.R. § 825.209(h).

[73] 29 C.F.R. § 825.209(e).

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exclusions for preexisting conditions.[73] The ADA does not require an employer to maintain benefits unless the employer affords benefits to employees who are on similar types of leave.[74] Therefore, if an employee is entitled to additional leave after exhausting her 12-week FMLA leave, the employer may be able to discontinue her benefits. However, if the employee has not exhausted her FMLA leave, and a reduced schedule without health benefits would be a reasonable accommodation, the employee is permitted to work a reduced schedule with health benefits until she has exhausted her FMLA leave.[75] The employer should always provide the benefits under the statute that affords the greatest protection.

Job Restoration. Under the FMLA an employer is required to restore an employee to the same or equivalent position.[76] Under the ADA and the FMLA, the employer cannot require that the employee obtain a release with no restrictions before returning the employee to work. Rather, the employee only needs to be able to perform the essential functions of her job.[77] The Eighth Circuit recently addressed this issue in *Duty v. Norton-Alcoa Proppants*.[78] The employee took FMLA leave for degenerative disk disease. The employer fired the employee even though he was certified to return to work with limitations on lifting.[79] The employee presented evidence at trial that heavy lifting was not an essential function of his job.[80] In affirming the jury's finding that the employer violated the FMLA, the court noted that the FMLA requires an employee to demonstrate only that he can perform the essential functions of his former job, not that he is at 100 percent capacity, to be eligible for job restoration.[81] Similarly, if a reasonable accommodation will allow the employee to perform the essential functions of her job, the employer is required to provide such accommodations.

Under the FMLA, an employer is not obligated to reinstate an employee if the employee cannot perform the essential functions of her job.[82] The employer also need not reinstate the employee if the employee would not have continued in his employment if he were not on leave.[83] For instance, if an employee would have been terminated for poor performance if she had not taken leave, the FMLA permits the employer to terminate her while on leave or if her job had been eliminated for some reason such as downsizing. It is always a risky proposition to terminate an employee based upon performance issues while she is on FMLA leave. An employer should think long and hard before making such a decision as it is sure to invite a lawsuit.[84] An employer does not have to reinstate a key employee, who was notified before taking leave that her return would cause substantial and grievous economic injury to the employer.[85]

If the employee took a leave of absence as her reasonable accommodation under the ADA, the employer must return the employee to her original position unless the employer can show that holding open the position would impose an undue hardship.[86] If holding the position open would pose an undue hardship, the employer is required to place the employee in an equivalent vacant position for which the employee is qualified and to which the employee can be reassigned without undue hardship.[87] The employer cannot unilaterally reassign the employee to a vacant position, but must assess whether the employee can perform the essential functions of her job with or without a reasonable accommodation.[88] An employer does not fulfill its

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[74] 29 C.F.R. § 825.702(b). However, an employer cannot discriminate against a qualified individual with a disability with respect to benefit coverage. An employee with a disability must receive the same benefits as other employees. See 29 C.F.R. § 1630.4(f).
[75] 29 C.F.R. § 825.702(c)(3).
[76] 29 C.F.R. § 825.214(a).
[77] 29 C.F.R. § 825.214(b).
[78] Duly v. Norton-Alcoa Proppants, 293 F.3d 481 (8th Cir. 2002).
[79] *Id.* at 487.
[80] *Id.* at 492.
[81] *Id.* at 495.
[82] 29 C.F.R. § 825.214(b).
[83] 29 C.F.R. § 825.216(a)(1)-(2)(b).
[84] *See, e.g., McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099 (10th Cir. 2002) (affirming the dismissal of the case stating that the FMLA does not protect an employee from discipline for performance problems caused by the condition for which FMLA leave is taken nor does it require the employee to be given the opportunity to show improved job performance when not ill).
[85] 29 C.F.R. § 825.216(c).
[86] EEOC Enforcement Guidance on Reasonable Accommodation, *supra* note 60, ¶ 18; 29 C.F.R. § 1630.2(o).
[87] *Id.* ¶¶ 18, 24; 29 C.F.R. § 1630.2(o)(2)(ii).
[88] *Id.*; *see also Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011 (8th Cir. 2000) (rejecting the employer's argument that only a person who is able to perform the essential functions of his or her current position is entitled to a reassignment).
[89] *See Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89 (2d Cir. 1999).

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obligation to provide a reassignment when there is a vacant position comparable to the employee's current job, but the employer instead transfers the employee to a position that involves significant diminution in salary, benefits, seniority, or other advantages of the employee's current position.[89] Reassigning an employee to a vacant position raises the issue of what to do when a non-disabled, more qualified person applies for the vacant position. The Supreme Court recently addressed this in *US Airways, Inc. v. Barnett.*[90]

In Barnett, the employer had a seniority plan and the court held that a reassignment request that violates a bona-fide seniority plan is unreasonable as a matter of law unless the employee can establish special circumstances otherwise.[91] The court seems to have shifted the burden of proving undue hardship to the employee when the employer has a neutral seniority plan.[92] The FMLA, on the other hand, does not permit the employer to consider undue hardship. The employer must hold open the position under the FMLA, whether it is a hardship or not, or otherwise place the employee in an equivalent position.[93] If the employee poses a direct threat to herself or others, the employer need not reinstate the employee. The U.S. Supreme Court recently upheld the EEOC's interpretation that the direct threat analysis included the employee's own health.[94] The court stated that if employers could not keep employees with disabilities out of positions that threaten their health, the employer's duty to comply with the ADA would be at loggerheads with the competing policy of OSHA to ensure the safety of each and every worker.[95] However, the employer should not assume the employee will re-injure herself when returning from workers' compensation leave. The employer must be able to show the risk of returning to the position rises to a direct threat.[96] An employee poses a direct threat when a reasonable accommodation cannot eliminate or reduce the significant risk of substantial harm to the safety of the employee or others.[97] In determining whether an employee poses a direct threat, the employer should consider these factors: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.[98] When an employer refuses to reinstate an employee because the employer assumes the employee's disability creates an increased risk of a work-related injury, the employer discriminates against the employee.[99]

III. CONCLUSION

A failure to comply with any of these statutes can subject an employer to costly and protracted litigation including the employee's attorney's fees. Therefore, in advising a client when these statutes are implicated, an attorney should consider the employee's rights under each statute separately and then whether the statutes overlap before determining the appropriate action to take. If an analysis leads to inconsistent results, the employer should grant the employee the benefits under the statute that affords the employee the greatest protection in order to avoid liability.

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[90] 122 S. Ct. 1516 (2002).
[91] *Id.* at 1525.
[92] *See* Cheryl L. Anderson, "Neutral" Employer Policies and the ADA: The Implications of U.S. Airways, Inc. v. Barnett Beyond Seniority Systems, 51 Drake Law Rev. 1 (2002) (discussing the implications of Barnett).
[93] 29 U.S.C. § 2614(a)(1).
[94] *Chevron U.S.A., Inc. v. Echazabal*, 122 S.Ct. 2045 (2002).
[95] *Id.* at 2052.
[96] *See* The U.S. Equal Employment Opportunity Commission, EEOC Enforcement Guidance: Workers' Compensation and the ADA, ¶ 14 (July 6, 2000), www.eeoc.gov/docs/workcomp.html [hereinafter EEOC Guidance Workers' Compensation]. Courts have found a direct threat in the following cases: *Emerson v. Northern States Power Co.*, 256 F.3d 506 (7th Cir. 2001) (A customer information associate with an anxiety disorder posed a direct threat to others where she had had two panic attacks at work*, her duties included handling emergencies such as gas leaks, she needed unpredictable breaks of indeterminate time, and her condition might never improve); Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F.3d 1275 (11th Cir. 2001) (A dental hygienist who was HIV-positive posed a direct threat to others. There was a significant risk of HIV transmission to patients, the risk was of indefinite duration, and the potential for harm was eventual death.). *Cf. Rizzo v. Children's World Learning Ctrs.*, 213 F.3d 209 (5th Cir.), cert. denied, 531 U.S. 958 (2000) (A school van driver with a hearing impairment did not pose a direct threat where she had a safe driving history, she supervised children adequately, and she used the van's mirrors to keep order on the van.).
[97] 29 C.F.R. § 1630.2(r).
[98] EEOC Guidance Workers' Compensation, *supra* note 96, ¶ 11.
[99] *Id.* ¶ 14.

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economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family.

V. The common problem (two different results).

A. Heuertz v. City of LeMars/Floyd Valley Hospital (Plymouth County).*

1. Plaintiff slips and falls on the hospital grounds. Plaintiff alleges that there is inadequate snow removal by the hospital. Plaintiff undergoes a cervical fusion and incurs over $25,000.00 in medical expenses. The plaintiff is 73 years of age and Medicare adjustments reduce the bill to approximately $9,500.00.

2. Plaintiff had offered deposition testimony from his medical care provider that the $25,000.00 figure was a fair and reasonable amount for the services rendered. Defendant established through cross-examination that the amounts as adjusted were all that could ever be recovered.

Plaintiff contends that the reduction in the medical bill was a "collateral source benefit" and the tortfeasor should not be permitted to take advantage of the benefit.

Defendant contends that even under the old collateral source rule plaintiff could never recover the $25,000.00 because that was not the actual medical bill finally submitted and paid for the services rendered

a. **QUESTION:** May the Defendant offer evidence that the medical bills have been paid by Medicare:

ANSWER: In a ruling filed March 30, 1998, Judge Patrick Carr held that plaintiff's Motion in Limine would be sustained and the Defendants could not offer evidence that the medical bills had been paid by Medicare.

Iowa Code Chapter 668.14 provides that the Court shall permit evidence and argument as to collateral source payments, except to the extent that such payments have been made pursuant to a state or federal program, the assets of the claimant or members of the claimant's immediately family.

b. **QUESTION:** Are the plaintiffs prohibited from offering or referring to the $25,000.00 in medical bills because those bills were subsequently adjusted and were therefore not relevant to any issue in the case.

ANSWER: Judge Carr granted the Defendant's Motion in Limine and found pursuant to Rule 104 of the Iowa Rules of Evidence that the plaintiff could not offer or refer to the $25,000.00 in medical bills.

B. Lillian Koch and Wilbur Koch v. Eula Wimmer, (Monona County), February 20, 2002, Judge Edward Jacobson (Third Judicial District) declined to follow Judge Carr's Ruling.

1. Judge Jacobson felt that fair and reasonable charges are "what is customarily charged by a medical provider to a patient willing and able to pay his bill" irrespective of any contract between the provider and Medicare, insurance companies, or the like.

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2. Relying on decisions from Wisconsin and Virginia, and on a review of Iowa case and statutory law, the Court held:

   "Because of the collateral source rule clearly applies to the facts at bar under the provisions of Iowa Code Section 668.14(1), because the collateral source rule has a long standing common law acceptance by the Courts of Iowa, because the common law collateral source rule philosophy of the Iowa Court is significantly similar to that of Wisconsin and Virginia, and because Wisconsin and Virginia have both clearly interpreted that rule to allow Plaintiff to submit medical damages at their face value rather than at their adjusted value, the Defendants' Motion in Limine in this case is denied."

VI. Defense Arguments to Exclude Actual Bills.

A. Original bill is irrelevant. Rule 402.

B. The adjusted amount (if determined prior to trial) is all that can be recovered by the healthcare provider as it is the bill that was finally submitted and what was paid for medical services.

C. The actual bill before the downward adjustment for payment by Medicare or Medicaid should be excluded as its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. Rule 403.

D. If the plaintiff is allowed to put into evidence the total bill then the defendant should be allowed to put in the lower adjusted amount to show what the plaintiff is going to have to pay.

E. To allow the plaintiff to put in the actual bill without any evidence of the downward adjusted amount paid by Medicare or Medicaid results in a windfall to the plaintiff if the jury awards the full medical bill.

F. The actual bill is the Medicare/Medicaid payment. Once the bill has been adjusted downward and paid it has become the actual bill.

VII. Considerations for the Defense:

It is evident from the current state of the law that the defendant is well advised to explore with the doctor during his deposition not only whether bills have been paid by Medicare/Medicaid or other insurance and whether that payment was accepted in full for the payment, but whether the hospital, clinic or doctor have contractual arrangements with a network healthcare provider or entity paying the bills that provides for a reduced charge. The doctor may not know this information and it may be necessary to depose someone in the business office to determine the exact amount of the cost of the healthcare and services.

Further, should the plaintiff refuse to provide the post adjusted medical bills paid by a governmental health insurance agency asserting it is not relevant to establishing the reasonable value of past medical expense damages, the defendants should certainly respond that it is relevant in determining the value and the actual cost is the best evidence of the true value of the services.

While we await a determination on this issue from the appellate courts it would be wise for defense counsel to carefully craft their discovery questions to establish the the true value of the services which is best represented by the cost of the services.

Does allowing the plaintiff to recover only the amount that was paid by Medicare and accepted by the healthcare provider in full settlement of their claim for services really allow the defendant

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dispute that contention. As a federal judge, I emphatically reject that idea.

However, there are some things which critics always point out as supporting the view that federal practice is more complex, such as the existence of local rules, the inordinately long final pretrial conference orders in civil cases, and the federal rules of civil procedure and criminal procedure. Since the rules of civil procedure and criminal procedure in Iowa state court are largely modeled after, or fashioned upon nearly analogous federal rules, criticisms directed at federal rules of practice carry little weight.

I will concede that often federal pretrial orders appear to value form over substance. They can, and should be, streamlined. Having said that, I would note that I am not aware of any of the magistrate judges who conduct most of the final pretrial conferences in civil cases throughout the state are opposed to allowing appropriate and relevant changes to pretrial orders when such changes are obviously beneficial to the parties and the court. The bottom line remains, however, that the final pretrial conference orders have a purpose and a place. The problem is that since many practitioners are procrastinators, having to put together and assemble witness lists, exhibit lists, stipulated facts, contested issues of fact and law, at times ranging from 28 days down to 10 days before trial, causes many good lawyers to have second thoughts about litigating in federal court.

The fact remains that without organization and preparation no trial, whether in state court or federal court, will try itself.

Putting aside the issue of preparation of final pretrial conferences, one other area deserves attention and emphasis because adherence to the local rules of the United States District Courts for the Northern and Southern Districts of Iowa, as amended most recently January 1, 2003, can make life easier for even the biggest procrastinator.

Perhaps even more importantly, however, is that flagrant abuse of the local rules, which often seem to be honored in the breach, only invites disaster.

And, as an aside, it should be noted that local rules are promulgated by some, if not all, of the state district courts, so suggestions that only federal court "piles on" rules is an unjustified observation.

The local rules have been combined for the Northern and Southern Districts of Iowa. Reference to, and use of the local rules, while certainly expected of practitioners, can also ensure a less stressful existence for both the practitioners and the court. It should go without saying that the local rules are implemented for a reason but, not surprisingly, reference to them seems to be an afterthought to many lawyers.

My comments here are not for the purpose of reciting verbatim each and every one of the local rules. They are available, free, from the clerk of court offices in Des Moines, Cedar Rapids, Sioux City, Davenport, Council Bluffs and Fort Dodge. They are also available on the Northern District's web site at www.iand.uscourts.gov and the Southern District's web site at www.iasd.uscourts.gov.

All the local rules are important; they all cannot be committed to memory. All local rules don't have a daily application. Therefore, let me give you some thoughts I have as to which of the local rules have the most relevancy to daily issues:

L.R. 3.2 Statement of Interest; L.R. 5.3 Electronic Civil Case Files, Filing, Imagining, and Access; L.R. 6.1 Additional Time After Electronic Service; L.R. 7.1 Motions and Other Requests for Court Action; L.R. 16.1 Scheduling Order and Discovery Plan; L.R. 16.2 Final Pretrial Conference; L.R. 26.1 Pretrial Discovery and Disclosures; L.R. 37.1 Discovery Disputes - Motions to Compel; L.R. 56.1 Summary Judgment; L.R. 72.1 United States Magistrate Judges; L.R. 83.2 Attorneys.

Of these local rules, I believe that L.R. 7.1, L.R. 16.1, L.R. 37.1, L.R. 56.1 and L.R. 83.2 probably are at issue more often than any of the others. Remember, too, that the local rules are numbered to correspond with federal rules of civil procedure, using decimal points to differentiate from the federal rules.

L.R. 7.1 was designed to make motion practice simpler in federal court. Thus, calling an opponent and obtaining

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OBSERVATIONS FROM THE BENCH *. . . continued from page 20*

his or her position on the requested relief, and reciting that in the motion, makes ruling on the motion move much quicker. A violation of the local rules can result in summary denial of the requested relief, and then the whole process starts all over.

Failure to file the necessary supporting documents for motions for summary judgment filed pursuant to Fed. R. Civ. P. 56 is also frustrating for the court, and can result in denial of the motion regardless of how well taken the legal position may be.

Motions to withdraw are covered by L.R. 83.2. The most common stumbling block there is the failure of counsel seeking to withdraw to send a copy of the motion to withdraw to the client. When that happens, the court has no choice but to deny the motion, or to order counsel to serve the client, and then wait another 14 days before being able to consider the issues.

Another practice tip is to observe and use Fed. R. Civ. P. 29 when making agreements with opposing counsel regarding informal extensions of discovery deadlines. Remember, your informal agreements may very well be made in good faith, and for good reasons, but the court doesn't know about them without notice. Thus, filing a stipulation pursuant to Rule 29 allows the court to be aware of what is involved, and to either gives its approval, or to advise counsel why the agreement is not workable. This is particularly crucial in those cases that fall within Judge Pratt's expedited docket (rocket docket) procedure. That docket is designed to move cases to trial as quickly as possible, and adherence to the deadlines is a necessity. Informal agreements only serve to create more problems than they solve.

My confidence in the Iowa Bar has only has been heightened by my experience as a magistrate judge. True, I have had to author some unsatisfying opinions, and on rare occasions, even order sanctions. But those are out of the norm. Most often I find working with Iowa practitioners to be rewarding, enlightening and a pleasure. Keep it up. You have not disappointed me.

SCHEDULE OF EVENTS

2003 Meeting Dates

June 5-6, 2003

Iowa Defense Counsel Association Board Meeting
Ameristar Hotel
Council Bluffs, IA

June 6-7, 2003

Defense Research Institute
Mid-Regional Meeting
Ameristar Hotel
Council Bluffs, IA

September 24-26, 2003

Iowa Defense Counsel Association Annual Meeting & Seminar
Des Moines Marriott Downtown
Des Moines, IA

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A PRIMER ON THE WORKERS' COMPENSATION COMMISSIONER'S WEBSITE . . . continued from page 6

VanBlaricum v. Titan Tire Corp., file 1122750: This worker had a prior claim a few years previous. In this action for review/reopening, he was seeking new surgery, and claimed the need for new surgery was the direct result of the old work injury. The Defendants offered into evidence a medical opinion that the need for new surgery was not due to the work injury. This defense medical opinion was disregarded by the Deputy, who awarded benefits. In this appeal decision, the Commissioner agreed with the Deputy in disregarding the medical opinion, due to factual deficiencies in it. However the Commissioner ruled that the rejection of the defense medical report did not, by itself, mean that the worker had carried his burden that the new need for surgery was work-related. Under such circumstances, when the worker seeks new treatment for an injury for which they have already been placed at maximum healing, the worker must offer a medical opinion supporting causation and reasonableness of treatment before the Commissioner will make an award.

Sitzman v. Wal-Mart, file 1243102: This case continues a line of cases very troublesome to employers and carriers (and defense attorneys for that matter). This worker (age 62 at injury) suffered an injury to the low back, and was left with 11% impairment of the body. That was paid. The worker returned to work, and the employer accommodated his restrictions. At the time of trial he was making $2/hr. more than at the time of injury. The employer stopped PPD payments after paying the impairment rating, as has long been standard practice. Until the case of *Fitzgerald v. General Mills*, file 1056980 (deputy Trier, 1997), carriers believed that they were entitled to dispute the permanency benefits in excess of the impairment rating that might be owed an injured worker, and could dispute that issue all the way to trial. In this way, workers' compensation adjusting was thought to be similar to non-work personal injury claims, where a carrier is always privileged to dispute the damages owed until the case is tried. *Fitzgerald* was the first case that held that the level of industrial disability was so obviously in excess of the impairment rating, that the owing of such excess PPD was not "fairly debatable." Thus the failure to voluntarily pay more PPD than the rating would dictate resulted in a penalty. The appellate courts have never ruled on this issue. The *Sitzman* shows Commissioner Trier's continued commitment to the *Fitzgerald* rule. The deputy hearing the *Sitzman* matter had ruled that the worker was 75% disabled from the injury, and that the 11% the employer had paid was a "paltry" sum. The employer was penalized for not paying more. The Commissioner affirmed, even though there was a return to work for the same or more money. Perhaps the appellate courts will finally rule on this issue that is important to workers' compensation practitioners.

Parrish v. Hawkeye Wood Shavings Inc. file 1273196: This worker claimed that he suffered a low back injury due to prolonged sitting at work. Dr. Koontz gave him an impairment rating of 26% of the whole person, and gave an opinion causally linking the injury to work. The carrier denied the claim in a letter to the worker, but was not very specific as to why. The Commissioner made a number of interesting rulings. First, he ruled that Koontz' causation opinion would be accepted, notwithstanding arguments that such an injury does not arise out of employment pursuant to *Miedema v. Dial Corp.*, 551 N.W.2d 309 (Iowa 1996). Second, despite the seeming applicability of Miedema, the Commissioner assessed a penalty against the carrier for denying the claim, ostensibly due to the fact that the denial letter failed to state with enough specificity the reason for the denial. Finally, the Commissioner awarded the surprising industrial disability of 10%. Regarding language in *Gibson v. ITT Hartford*, 621 N.W.2d 388 (Iowa 2001) indicating that the impairment rating is a "floor" in industrial cases, the Commissioner stated that that language was mere dicta, and not generally applicable. This reaffirms some very old Commission cases which held that industrial disability could, on occasion, be less than the impairment rating. However this makes the Sitzman case all the more difficult to understand.

If you practice in the area of workers' compensation, I hope you will often visit the Commissioner's website and take advantage of its many useful features.

ADMISSIBILITY OF PRE-ADJUSTED VERSUS POST-ADJUSTED MEDICARE/MEDICAID BILLS *. . . continued from page 15*

a windfall? Arguably it does not result in any such windfall as the original stated value of the services was not their true value. The best evidence of the value of the services is what was paid and accepted on the bill.

VIII. Consider, would the result be the same if an HMO or other private payor contracted with the doctor who accepted less than the usual and customary charge for service?

Note: Comment c to Section 920A Gratuities provides that . . . "thus the fact that the doctor did not charge for his services or the Plaintiff was treated in a veteran's hospital does not prevent his recovery for the reasonable value of the services."

* For a complete discussion of this case please see "Application of the Collateral Source Rule to Medicare Adjustments by Michael W. Ellwanger in the Defense Update of the Iowa Defense Counsel Association Newsletter, April, 1998 Volume XI, No. 2.

BOB WATERMAN
. . . continued from page 5

We are all, I think, conscious of the certainty of death and all have the hope of getting out of this world without protracted pain and suffering. Perhaps, then, our grief for friends who die suddenly is more for ourselves, than for the one who is gone.

To have lived a long and healthful life, to have been married to a charming and lovely woman, to have brought forth totally outstanding children, to have served one's country in time of war, to have been a success in one's chosen profession and loved, admired and respected by family, friend and contemporaries and to have died in God's good grace is no small thing.

Would that it would happen as well to all of us.

WELCOME NEW MEMBERS

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FROM THE EDITORS . . .

By: Kermit B. Anderson, Des Moines, IA

The current legislative session is coming to a close and will probably be concluded by the time this issue of Defense Update is published. At this writing, however, several IDCA backed provisions are still alive in the Omnibus Tort Bill, S.F. 344, which recently passed the Senate.

Provisions eliminating the 5% limitation on the reduction in damages for failing to wear a seat belt, disallowing pre-judgment interest from the date of the making of a rejected offer to confess judgment if trial results in recovery of a lesser amount, and reducing the interest rate on workers' compensation judgments from 10% to 5% are are all supported by the IDCA. These measures are each the subject of a separate bill in the House and have all been passed out of the House judiciary committee.

S.F. 344, which includes many more provisions on which the IDCA takes no position, now goes back to the House for debate. The Iowa State Bar Association, the representative group for all lawyers, and the Iowa Trial Lawyers Association are actively opposed to all of SF 344's provisions. This opposition makes the IDCA's lobbying efforts in favor of select parts of SF 344 very difficult. Even if any of these measures were to reach the governor's desk, a veto would seem probable barring unusual circumstances. Once again our thanks go out to Bob Kreamer for his lobbying efforts on behalf of the IDCA.

Legislation of interest to defense practitioners is also being considered in the U.S. Congress. On March 13, 2003 the House of Representatives passed and sent to the Senate a bill known as H.R. 5. This legislation would enact major changes in the litigation of medical malpractice actions in all State and Federal courts.

H.R. 5 provides that in all "health care lawsuits" (essentially any liability claim asserted against a health care provider or supplier of a medical product) non-economic damages are capped at $250,000, joint and several liability is eliminated, claimant's attorney fees are regulated, evidence of collateral source benefits is permitted, and punitive damages are greatly restricted and limited to the greater of $250,000 or twice the economic damages awarded. These provisions would apply to all "health care lawsuits" brought in any State or Federal court, and would preempt inconsistent state law. A similar bill, known as the "Health Act of 2003," was introduced March 12, 2003 in the U.S. Senate by Senator Ensign of Nevada.

The provisions in both these bills are controversial and bound to spark vigorous debate from a number of interest groups. Whether either bill will ultimately pass the Senate is uncertain. But any bill that does reach the President's desk is likely to be signed into law, thereby bringing significant change to health care litigation in Iowa and every other State in the nation.

The Editors: Kermit B. Anderson, Des Moines, IA; Mark S. Brownlee, Fort Dodge, IA; Michael W. Ellwanger, Sioux City, IA; Noel McKibbin, West Des Moines, IA; Bruce L. Walker, Iowa City, IA; Thomas D. Waterman, Davenport, IA; Patrick L. Woodward, Davenport, IA

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