




Absent Again: Use and Abuse of FMLA and Workers' Compensation Leave
 33rd Annual NC Health Directors Legal Conference
 UNC School of Government
 April 23, 2014



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Absent Again: Use and Abuse of FMLA and Worker Compensation Leave
 April 23, 2014
 Presented by: Jill Quattlebaum Byrum



MANAGING LEAVE

- Family and Medical Leave Act ("FMLA")
- NC Workers' Compensation Act
- Americans with Disabilities Act ("ADA")
- Avoiding Retaliation and Discrimination claims




FAMILY AND MEDICAL LEAVE ACT ("FMLA")




FAMILY AND MEDICAL LEAVE ACT


The FMLA requires covered employers to allow at least 12 weeks of unpaid leave per year for covered employees for certain qualifying events.



FAMILY AND MEDICAL LEAVE ACT

... the method used to determine the 12-month period shall be the 12-month period measured forward from the date any employee's family and medical leave begins.

25 N.C.A.C. 1E.1401 (2014)



FAMILY AND MEDICAL LEAVE ACT

An eligible employee is one who:

- has been employed for at least 12 months,
- has worked for at least 1250 hours during the 12 months immediately preceding the beginning of leave, and
- is employed at a worksite with 50 or more employees within 75 miles.



FAMILY AND MEDICAL LEAVE ACT

An employee who has been employed with State government for at least 12 months and who has been in pay status at least 1040 hours (half-time) during the previous 12 months period shall be entitled to a total of 12 workweeks, paid or unpaid, leave during any 12 month period for one or more of the reasons listed in the Family and Medical Leave Act.

25 N.C.A.C. 1E.1402 (2014)



FAMILY AND MEDICAL LEAVE ACT

Temporary Employees - A temporary employee shall be covered if the employee has worked at least 1250 hours during the past 12-month period. Any leave granted to a temporary employee shall be without pay.

25 N.C.A.C. 1E.1402 (2014)



FAMILY AND MEDICAL LEAVE ACT

Generally FMLA leave may run concurrently with other types of leave if employer notifies employees.



FAMILY AND MEDICAL LEAVE ACT STATE PERSONNEL ACT

Workers' Compensation Leave - If an employee is on workers' compensation leave drawing temporary total disability, the time away from work is not considered as a part of the family and medical leave 12-week entitlement.

25 N.C.A.C. 1E.1404 (2014)




FAMILY AND MEDICAL LEAVE ACT

Recognizing a Qualifying Event




FAMILY AND MEDICAL LEAVE ACT



FMLA leave may be taken for:

- the care of a spouse, child or parent with a serious medical condition; or
- the employee's own serious medical condition that makes them unable to perform the functions of their job.





FAMILY AND MEDICAL LEAVE ACT

What is a serious health condition?

Any physical or mental condition requiring

"Inpatient Care": or overnight stay in a medical care facility; or






FAMILY AND MEDICAL LEAVE ACT

SERIOUS HEALTH CONDITION

"Continuous treatment" by a health care provider:

- Incapacity lasting more than three consecutive calendar days requiring two or more visits to a health care provider.
 - Three full days of incapacity required
 - Treatment generally must occur twice within 30 days, with first visit within 7 days




FAMILY AND MEDICAL LEAVE ACT

SERIOUS HEALTH CONDITION

"Continuous treatment" by a health care provider:

Incapacity lasting more than three consecutive calendar days requiring one or more visits to a health care provider AND requiring continuing medical treatment (prescription drugs or therapy, but not exercise, bed rest, or over-the-counter drugs).

- Three full days of incapacity required
- First in-person treatment must occur within seven days of incapacity




FAMILY AND MEDICAL LEAVE ACT


Serious Health Condition

Chronic Conditions

May also include chronic conditions that continue over an extended period. These conditions may be episodic, requiring only "periodic treatment" (at least twice per year).

Examples include: diabetes, epilepsy, back conditions, high blood pressure, and repetitive motion injury





FAMILY AND MEDICAL LEAVE ACT

Serious Health Condition

- May also include incapacity due to **pregnancy**.
- May include permanent or long term incapacity which requires **medical supervision, but not necessarily treatment** (Alzheimer's, stroke, terminal illness).
- May include absence(s) to receive multiple treatments for restorative surgery after an accident or illness or, **a condition that, if untreated, would likely result in incapacity of more than three consecutive calendar days** (post-operative physical therapy, dialysis (kidney disease), and radiation (cancer)).




FAMILY AND MEDICAL LEAVE ACT

Serious Health Condition

Examples of Serious Health Conditions

- Cancer
- Back conditions
- Heart conditions
- Pneumonia
- Severe arthritis
- Pregnancy, miscarriages, complications or illness related to pregnancy
- Alzheimer's disease
- Clinical depression




FAMILY AND MEDICAL LEAVE ACT



Serious Health Condition

Examples of illnesses that are **not** typically Serious Health Conditions

- Cosmetic treatment, unless hospital care is required or complications develop
- Common cold
- Flu
- Ear ache
- Routine dental or orthodontic work
- Upset stomach
- Headache other than migraine



QUESTIONS And Answers





FAMILY AND MEDICAL LEAVE ACT

Serious Health Condition

An employee has dental work performed, which is typically *not* a serious health condition, and misses work for three consecutive days.

Should the manager provide an FMLA leave packet to this employee?



FAMILY AND MEDICAL LEAVE ACT



Yes. The employee may have a condition which requires “continuous treatment” by a health care provider.



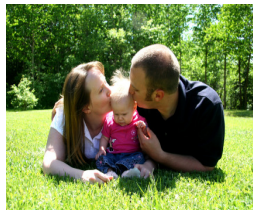

FAMILY AND MEDICAL LEAVE ACT

FMLA leave may be taken for:

- Childbirth
- Adoption
- Foster care

FAMILY AND MEDICAL LEAVE ACT CHILDBIRTH



Both mother and father are entitled to 12 weeks of leave to be with their newborn child.



FAMILY AND MEDICAL LEAVE ACT CHILDBIRTH



Spouses employed by the same employer may be limited to a combined total of 12 weeks for birth, or placement of a child for adoption or foster care (or care of a parent).



FAMILY AND MEDICAL LEAVE ACT CHILDBIRTH



If a husband and wife working together for the same employer use only a portion of their individual 12 weeks for the birth of a child, the remainder may be used for other FMLA purposes.



FAMILY AND MEDICAL LEAVE ACT CHILDBIRTH

The mother is entitled to FMLA leave for:

- Incapacity due to pregnancy
- Prenatal care, or
- For her own serious medical condition following childbirth



FAMILY AND MEDICAL LEAVE ACT CHILDBIRTH

An expectant mother may take FMLA leave before the birth of a child:

- For prenatal care, or
- If her condition makes her unable to work



FAMILY AND MEDICAL LEAVE ACT CHILDBIRTH

An expectant mother is entitled to FMLA leave for incapacity due to pregnancy even though:

- She does not receive treatment from a health care provider during the absence, and
- Even if the absence does not last for more than three consecutive calendar days.

Example: A pregnant employee may be unable to report to work because of severe morning sickness.



FAMILY AND MEDICAL LEAVE ACT CHILDBIRTH

The husband is entitled to FMLA leave if needed to care for his pregnant spouse if she is incapacitated or to accompany her for prenatal care.



FAMILY AND MEDICAL LEAVE ACT CHILDBIRTH

An eligible employee may not use intermittent or reduced schedule leave after the birth or placement to be with a healthy newborn without the employer's permission.



FAMILY AND MEDICAL LEAVE ACT CHILDBIRTH

An employee's entitlement to FMLA leave for a birth or placement expires at the end of the 12-month period beginning on the date of birth or placement.



FAMILY AND MEDICAL LEAVE ACT

MILITARY LEAVE



FAMILY AND MEDICAL LEAVE ACT

Qualifying Exigency Leave

Intermittent or continuous leave is available for up to 12 weeks for a "qualifying exigency"



FAMILY AND MEDICAL LEAVE ACT

Qualifying Exigency Leave

Covers eligible employees who have parent, spouse, or child who is a covered servicemember


- Child defined for this provision as "the employee's biological, adopted, or foster child, stepchild, legal ward, or child for whom the employee stood in loco parentis...who is of any age."
- Child typically defined under FMLA as under age 18 unless incapable of self care.



FAMILY AND MEDICAL LEAVE ACT

Qualifying Exigency Leave


“Covered servicemember” includes military reserves or National Guard during deployment to a foreign country under a call or order to active duty and regular military scheduled for deployment to a foreign country.

FAMILY AND MEDICAL LEAVE ACT

“Qualifying Exigency” is defined as

- Short notice deployment
 - Can be used for up to seven days prior to deployment when covered servicemember is notified of a call to duty seven or less days before deployment
- Military activities or events
 - Family support or assistance
 - Informational briefings or military ceremonies/events related to deployment
- School activities or planning for emergency childcare or parental care needs
 - Regular daily care excluded



FAMILY AND MEDICAL LEAVE ACT

“Qualifying Exigency” is defined as

- Legal or financial arrangements necessary to address absence
- Non-medical counseling for self or children necessitated by active duty
- Rest and Recuperation
 - Up to 15 days for visit for servicemember on leave
- Post deployment activities
 - Deal with return of service member: death or return ceremonies
- Anything else agreed on between employee and employer




FAMILY AND MEDICAL LEAVE ACT

Qualifying Exigency Leave

Preventing Abuse

- Employer may require orders or other military documentation upon first request for leave and may contact the appropriate Department of Defense unit to verify orders
- Employer may require employee to certify the need for leave for each qualifying exigency
- Employer may contact third parties to confirm (ex.: schools)



FAMILY AND MEDICAL LEAVE ACT


Caregiver Leave




FAMILY AND MEDICAL LEAVE ACT

Caregiver Leave


- Covered servicemember includes military reserves, National Guard or regular military.
- Also covers a veteran who was a member of the Armed Forces, National Guard or reserves who was active in the military during the five year period before the employee first takes leave to care for them.



FAMILY AND MEDICAL LEAVE ACT

Caregiver Leave

Intermittent or continuous leave is available to eligible spouse, parent, son, daughter or “next of kin” of a covered servicemember, which is defined as the nearest blood relative other than a spouse, parent, or child.




FAMILY AND MEDICAL LEAVE ACT

Caregiver Leave

“Serious injury or illness” is defined as

- An injury or illness which was incurred or aggravated “in the line of duty while on active duty”
- Rendering the servicemember unable to perform their duties




FAMILY AND MEDICAL LEAVE ACT

2009 FMLA Regulations

Caregiver Leave


- Qualifying employees are eligible for 26 weeks of leave during a single 12 month period, which starts on the first day of caregiver leave.
- Employees may have more than one caregiver designation but never get more than 26 weeks of leave during the 12 month period.
- Spouses working for the same employer get a combined total of 26 weeks.



FAMILY AND MEDICAL LEAVE ACT

How to Recognize a Qualifying Event

- Knowledge of employee’s overnight hospitalization
- Employee’s absence of three or more full days (or knowledge of employee’s incapacity of three or more full days) or knowledge of employee’s serious health condition
- Knowledge of employee’s or employee’s spouse’s pregnancy
- Knowledge of employee’s family member’s serious health condition
- Knowledge of needs associated with military family member’s deployment overseas
- Knowledge of illness or injury of military family member



FAMILY AND MEDICAL LEAVE ACT

An employee must give notice of their need for leave. The employee does not have to specifically identify the leave as FMLA or even mention the FMLA; it is the responsibility of the employer to designate the leave as FMLA leave.




FAMILY AND MEDICAL LEAVE ACT

Notice/Certification Requirements

The employee shall give notice to the supervisor for leave requested.

25 N.C.A.C. 1E.1407 (2014)



FAMILY AND MEDICAL LEAVE ACT
Notice/Certification Requirements

It is the responsibility of the employer to designate the leave as FMLA qualifying; no “magic words” are required.

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FAMILY AND MEDICAL LEAVE ACT
Notice/Certification Requirements

Designation of Leave as Family and Medical Leave. The agency shall:

- (1) determine that leave requested is for a family and medical leave qualifying reason, and
- (2) designate leave, whether paid or unpaid, as family and medical leave even when an employee would rather not use any of the employee’s family and medical leave entitlement.


25 N.C.A.C. 1E.1406 (2014)

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FAMILY AND MEDICAL LEAVE ACT
Notice/Certification Requirements

When an employee is on paid leave but has not given notice of the need for family and medical leave, the agency shall, after a period of 10 workdays, request that the employee provide sufficient information to establish whether the leave is for a family and medical leave qualifying reason. This does not preclude the agency from requesting the information sooner, or at any time an extension is requested.

25 N.C.A.C. 1E.1406 (2014)


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FAMILY AND MEDICAL LEAVE ACT
Notice/Certification Requirements

Employees must notify their employer at least **30 days** in advance of the foreseeable need for leave.

When the need for leave is unforeseeable, notice must be given as soon as practicable, but at least **within 2 business days** of learning of the need for leave.

If employee fails to provide notice, without excuse, the leave may be **delayed or denied**.

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FAMILY AND MEDICAL LEAVE ACT
Notice/Certification Requirements

An employee must provide a completed certification to the employer within 15 days.


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FAMILY AND MEDICAL LEAVE ACT
Certification Requirements

Employee’s failure to provide a complete and clear certification may result in the **delay of or denial** of leave.

- Employer must advise employee in writing of which information is necessary to make certification complete.
- Seven (7) calendar day cure period must be provided.
- Employer must advise employee of consequences of failure to provide.



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FAMILY AND MEDICAL LEAVE ACT

Certification Requirements

Employer's health care providers, human resources professional, leave administrator, or management official (**but not the employee's direct supervisor**) may contact the employee's doctor to authenticate or clarify a certification after the cure period has ended.

- Authorization: confirming completion or authorization of the form
- Clarification: understanding the response: either interpreting the handwriting or understanding of the meaning of the response



FAMILY AND MEDICAL LEAVE ACT

Certification Requirements

An employer may, at its own expense, require a second opinion certification from a provider selected and paid for by the employer.



FAMILY AND MEDICAL LEAVE ACT

Intermittent Leave and Reduced Schedules

Permitted if "**medically necessary**" which means when the medical need for leave is best accommodated through intermittent leave.

The employee must also make a **reasonable effort** to schedule medical treatment so as not to **unduly disrupt** business.



FAMILY AND MEDICAL LEAVE ACT

Preventing Abuse


Absences



An employee who is typically scheduled to work from 7:00 a.m. to 3:30 p.m. takes intermittent FMLA leave every day at 10:00 a.m. to have physical therapy. The employee's absence is disruptive to the department's operation. Can the supervisor do anything to address the situation?





Yes. The supervisor may request that the employee schedule the treatments at a time which is less disruptive to the department.




FMLA CALL-IN PROCEDURES

Policies may require that employees must advise the employer that they will be absent for FMLA reasons.



FMLA CALL-IN PROCEDURES

An example would be an instruction that employees calling in to identify that leave needed is “for my approved FMLA leave.”



FMLA CALL-IN PROCEDURES



When an employee indicates the need for an FMLA-related absence, the manager speaking with the employee may ask: “Is the leave related to your own medical condition or the condition of a family member (spouse, child, or parent)?”

FMLA CALL-IN INQUIRY

Leave for employee’s own illness


- 1) Is this leave needed for approved FMLA leave?
- 2) Are you scheduled to see a doctor today?
- 3) If you are scheduled to see a doctor, when did you make that appointment?
- 4) Will you be able to work for any part of the day?
- 5) When do you anticipate returning to work?

FMLA CALL-IN INQUIRY

Leave for family member’s illness

- 1) If the leave is for your family member, are you scheduled to provide transportation to a doctor’s appointment?
- 2) If you are not scheduled to provide transportation to a doctor’s appointment, why is the leave needed?
- 3) Will you be able to work for any part of the day?
- 4) When do you anticipate returning to work?



FMLA CALL-IN INQUIRY

An employee is required to respond to reasonable inquiries and failure to do so may result in denial of FMLA protection.



FMLA CALL-IN INQUIRY

The employer's reporting or call-in policy may not discriminate and must take into consideration all of the relevant facts and circumstances related to an employee's leave situation and must be flexible enough to allow for emergencies.



FAMILY AND MEDICAL LEAVE ACT

Medical Information

Managers should not inquire as to the *specific nature* of the medical problem, but should refer all such inquiries to human resources.



FAMILY AND MEDICAL LEAVE ACT

Medical Information

Managers should keep **independent records** about when FMLA paperwork was given.

Managers should also **document all communication** with employees regarding FMLA leave.



FAMILY AND MEDICAL LEAVE ACT

Preventing Abuse: *Certification*



FAMILY AND MEDICAL LEAVE ACT

Preventing Abuse: Certification

Employers may ask for a recertification of a serious health condition, but generally no more often than every 30 days unless:

1. circumstances described by the previous certification have changed significantly; or
2. the employer receives information casting doubt on the employee's stated reason for leave.



FAMILY AND MEDICAL LEAVE ACT

If the minimum duration of the employee's incapacity is more than 30 days, the employer may generally not request recertification until that minimum time has passed.



FAMILY AND MEDICAL LEAVE ACT

In every case, employers may request recertification every six months in connection with an employee's FMLA leave for a serious health condition.



FAMILY AND MEDICAL LEAVE ACT

Employers also may require a new medical certification with the first absence in a new 12-month leave year, and also exercise the right to seek second and third medical opinions.



FAMILY AND MEDICAL LEAVE ACT

Recertification

Recertification may be requested more frequently than otherwise permitted by the FMLA when:

- the employee requests an extension of leave;
- *circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or*
- *the employer receives information that casts doubt upon the continuing validity of the certification.*



Suspected Abuse of FMLA


An employee on intermittent FMLA leave misses work for **three Mondays and four Fridays** during a two month period.

What, if anything can the supervisor do?




FAMILY AND MEDICAL LEAVE ACT

Suspected Abuse




Recertification may be requested. A pattern of Friday/Monday absences can constitute “information that casts doubt upon the employee’s stated reason for the absence” thus supporting an employer’s request for re-certification.



FAMILY AND MEDICAL LEAVE ACT

A recertification more frequently than every 30 days could thus be justified, for example, if a medical certification indicated the need for intermittent leave for one or two days a month due to migraine headaches, and the employee took such leave every Thursday and Friday (the last two days of the employee’s work week).


FMLA 2004-2-A



FAMILY AND MEDICAL LEAVE ACT

The FMLA does not prohibit an employer from including a record of an employee’s absences along with the medical certification form for the health care provider’s consideration in determining the employee’s likely period of future absences. Nor does the FMLA prohibit an employer from asking, as part of the recertification process, whether the likely duration and frequency of the employee’s incapacity due to the chronic condition is limited to Mondays and Fridays.

FMLA 2004-2-A









Suspected Abuse of FMLA

A manager learns that an employee taking intermittent FMLA leave to care for a sick family member is seen at the beach.

What can the manager do?






FAMILY AND MEDICAL LEAVE ACT

Suspected Abuse

Supervisors should be trained to report any information that casts doubt on the employee’s need for leave to human resources, to review the employee’s FMLA paperwork and develop an appropriate course of action, to potentially include requesting recertification.



FMLA CALL-IN INQUIRY

Some courts have held an employer's requirement that employees give notice when they left home while on sick leave did not violate the FMLA because it did not affect the employees' exercise of their statutory rights, it just ensured that the workers did not abuse leave.



FAMILY AND MEDICAL LEAVE ACT

Reinstatement after Leave



FMLA RETURN TO WORK ISSUES

Employees may be required to provide a **physician's statement** certifying their fitness for duty to return to work and perform the essential functions of their job.



FMLA RETURN TO WORK ISSUES

On returning from FMLA leave, employees must generally be restored to their **original or equivalent positions** with equivalent pay, benefits, and other employment terms.



FMLA RETURN TO WORK ISSUES



An employee's need for a leave extension should be communicated to the employer as soon as the need for leave is known, and no later than two business days following the discovery of the need for additional leave.



FMLA RETURN TO WORK ISSUES

Failure to return to work on the day after the FMLA leave ends may be considered **voluntary resignation** without notice.



FAMILY AND MEDICAL LEAVE ACT Notice/Certification Requirements

If the employee is not going to work, the agency shall be notified in writing by the employee or someone acting on behalf of the employee. The agency shall consider failure to report at the expiration of the leave as a resignation unless an extension has been requested.

25 N.C.A.C. 1E.1407 (2014)



FMLA RETURN TO WORK ISSUES

An employee's anticipated failure to return at the end of FMLA leave should be communicated by supervisors to human resources for coordination of an action plan, and interactive process which may include:

- Additional leave (which may be required by the Americans with Disabilities Act)
- Termination
- Application for short-term disability benefits



SEPARATION BASED ON UNAVAILABILITY

An employee may be separated on the basis of unavailability when the employee becomes or remains unavailable for work after all applicable leave credits and benefits have been exhausted and agency management does not grant a leave without pay.

25 N.C.A.C. 1C.1007 (2014)



SEPARATION BASED ON UNAVAILABILITY

- (1) Unavailability is defined as the employee's inability to return to all of the position's essential duties and work schedule due to a medical condition or the vagueness of a medical prognosis; or the employee and the agency cannot reach agreement on a return to work arrangement that meets both the needs of the agency and the employee's medical condition; and
- (2) Applicable leave credits is defined as the sick, vacation and bonus leave the employee chose to exhaust prior to going on leave without pay.

25 N.C.A.C. 1C.1007 (2014)



FAMILY ILLNESS LEAVE

In addition to the 12 weeks of leave per year provided by the Family and Medical Leave Act as outlined in 25 N.C.A.C. 1E.1401-1411, an employee shall be entitled to up to 52 weeks of leave without pay during a five-year period in order to care for the employee's child, spouse, or parent, where the child, spouse, or parent has a serious health condition.

25 N.C.A.C. 1E.1412 (2014)




LEAVE WITHOUT PAY


Leave without pay for other reasons not covered under this Section shall be administered under 25 N.C.A.C. 1E.1100 Other Leave Without Pay. Under these provisions, employees must pay for health benefits coverage.

25 N.C.A.C. 1E.1402 (2014)



**NORTH CAROLINA WORKERS'
 COMPENSATION ACT**






**NORTH CAROLINA WORKERS'
 COMPENSATION ACT**
 Introduction

Events Covered


Employees are entitled to benefits if, while engaged in activities for the benefit of their employer, they suffer an **injury by accident, a specific traumatic incident** resulting in a hernia or back injury or **an occupational disease**.



**NORTH CAROLINA WORKERS'
 COMPENSATION ACT**
 Introduction

Events Covered

An accident is defined as an interruption of the regular work routine and the introduction of unusual circumstances (such as a fall, trip, slip or other unusual event or activity) likely to result in unexpected results or consequences.




**NORTH CAROLINA WORKERS'
 COMPENSATION ACT**
 Introduction

Events Covered

A specific traumatic incident as defined by our Appellate Courts includes back injuries that occur during normal work activities. While it was originally required that the incident occur at a judicially cognizable time, that requirement has been somewhat eroded by the Appellate Courts over time.

However, injuries that occur gradually over long periods of time are not specific traumatic incidents.




**NORTH CAROLINA WORKERS'
 COMPENSATION ACT**
 Introduction

Occupational Illnesses

Diseases are covered if they are due to (caused by or significantly contributed to) causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment.

Diseases are not covered if they are an ordinary disease of life to which the general public is equally exposed outside of employment.




**NORTH CAROLINA WORKERS'
 COMPENSATION ACT**
 Introduction

Wage Benefits

If an employee remains unable to work and earn wages for 7 days due to his disability he is entitled to weekly on-going benefits equal to 2/3 of his average weekly wage up to the maximum allowed by law. If disability continues beyond 21 days the employee is entitled to receive compensation retroactively for the first 7 days of disability.

This benefit is termed **temporary total disability (TTD)**.




**NORTH CAROLINA WORKERS'
COMPENSATION ACT**
Introduction

Wage Benefits

If an injured employee obtains employment after an injury and is unable to earn wages as great as those earned pre-injury the employee is entitled to compensation equal to 2/3 of the difference between the post injury and pre-injury average weekly wages up to the maximum allowed by law.

These benefits are known as temporary partial disability (TPD).




**NORTH CAROLINA WORKERS'
COMPENSATION ACT**
Introduction

Wage Benefits

If at the conclusion of an employee's medical treatment there is determined to be a permanent impairment to one or more of the parts of the body listed in a schedule in the Act, the employee may receive a set period of benefits without regard to his ability to earn wages.

The percentage of disability is determined based on a physician's numerical rating of the percentage of physical impairment and is called permanent partial disability (PPD).




**NORTH CAROLINA WORKERS'
COMPENSATION ACT**
Introduction

Wage Benefits

An employee may qualify for permanent and total disability (PTD) benefits if they are deemed by the IC to have no wage earning capacity, or automatically if the employee suffers the loss of:

- both hands, both arms, both feet, both legs, both eyes, or any two thereof;
- spinal injury involving severe paralysis of both legs, both arms or the trunk;
- severe brain or closed head injury; or
- second or third degree burns to 1/3 or more total body surface.



**NORTH CAROLINA WORKERS'
COMPENSATION ACT**
Introduction



Wage Benefits

Average weekly wage:

The average weekly wage is usually (but not always) computed by averaging all wages earned by the employee during the 52 weeks prior to the injury.

Maximum compensation rate for 2014: \$904.02

Minimum compensation rate: \$30.00 per week





**NORTH CAROLINA WORKERS'
COMPENSATION ACT**

When an employee is injured, the employee shall go on workers' compensation leave and receive the workers' compensation weekly benefits after the required waiting period. One of the following options may be chosen:

- (1) Option 1: Elect to take sick or vacation leave during the required waiting period.
- (2) Option 2: Elect to go on workers' compensation leave with no pay for the required waiting period.


25 N.C.A.C. 1E.0707 (2014)



**NORTH CAROLINA WORKERS'
COMPENSATION ACT**

After the employee has gone on workers' compensation leave, the weekly benefit may be supplemented by the use of partial sick or vacation leave, earned prior to the injury, in accordance with a schedule that is based on a formula designed to ensure that the monetary amount of leave an employee may supplement, combined with the workers' compensation benefits, is as close as possible to the employee's net pay after State and Federal taxes.


25 N.C.A.C. 1E.0707 (2014)



NORTH CAROLINA WORKERS' COMPENSATION ACT

PROTECTING AND PUTTING NORTH CAROLINA BACK TO WORK ACT

JUNE 24, 2011




NORTH CAROLINA WORKERS' COMPENSATION ACT
Pre-Employment Misrepresentation

(for claims arising after June 24, 2011)


A claim can be successfully denied if the employer is able to prove that in the course of entering into the employment relationship:

- the employee knowingly and willfully made a false representation about his physical condition;
- the employer relied upon the false representation(s) by the employee and the reliance was a substantial factor in the employer's decision to hire the employee; and
- there was a causal connection between the false representation and the injury or occupational disease.



NORTH CAROLINA WORKERS' COMPENSATION ACT
Pre-Employment Misrepresentation

However, an employer cannot ask any of these questions until a conditional offer of employment has actually been made.




NORTH CAROLINA WORKERS' COMPENSATION ACT
Directing Medical Treatment






NORTH CAROLINA WORKERS' COMPENSATION ACT
Introduction

Medical Treatment


Employers/insurance carriers must provide an injured employee must accept all reasonable medical, surgical, hospital, nursing and rehabilitative services, medicines, sick travel and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and which tend to lessen the period of disability.



NORTH CAROLINA WORKERS' COMPENSATION ACT
Reasonable access to medical information

The Protecting and Putting North Carolina Back to Work Act provides employers with greater access to medical information



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NORTH CAROLINA WORKERS' COMPENSATION ACT
Reasonable access to medical information

N. C. Gen. Stat. §97-25.6 was written in response to *Salaam v. N.C. Dept. of Transp.*, 122 N.C. App. 83, 468 S.E.2d 536 (1996), which barred all *ex parte* communications with treating physicians, handicapping an employer's ability to direct medical treatment and preventing the exchange of medical information necessary to the proper administration of an employee's claim.

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NORTH CAROLINA WORKERS' COMPENSATION ACT
Reasonable access to medical information

Previously:

- Communications between medical providers and employers or insurers were prohibited absent a written release from the employee, except for the limited medical status questionnaire, inhibiting the employer's ability to gather and exchange pertinent medical information about an injured employee.

Now:

- Medical records may be obtained without express authorization or release as long as the records are related to the claim or injury.

*See N. C. Gen. Stat. §97-25.6

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NORTH CAROLINA WORKERS' COMPENSATION ACT
Reasonable access to medical information

Written communication to the health care provider to obtain *relevant* information not available in the employee's medical records is allowed without the express authorization of the employee. However, the written communication must be contemporaneously provided to the employee, as well as any response received from the health care provider, within 10 days of receipt.

*See N. C. Gen. Stat. §97-25.6

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NORTH CAROLINA WORKERS' COMPENSATION ACT
Reasonable access to medical information

• Written communication (cont'd) medical information

The employer may request the following information:

- the diagnosis of the employee's condition;
- the appropriate course of treatment;
- the anticipated time that the employee will be out of work;
- the relationship, if any, of the employee's condition to the employment;

*See N. C. Gen. Stat. §97-25.6

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NORTH CAROLINA WORKERS' COMPENSATION ACT
Reasonable access to medical information

Written communication (cont'd) medical information

The employer may request the following information:

- work restrictions resulting from the condition;
- the kind of work for which the employee may be eligible;
- the anticipated time the employee will be restricted; and
- any permanent impairment resulting from the condition.


*See N. C. Gen. Stat. §97-25.6

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NORTH CAROLINA WORKERS' COMPENSATION ACT
Reasonable access to medical information

Oral communication with the authorized physician to obtain relevant medical information not contained in the written communication is allowed. However, the employee must be provided an opportunity to participate in the communication. If unable to participate, the employee must be provided with a written summary of the communication within 10 days.


See N. C. Gen. Stat. §97-25.6



NORTH CAROLINA WORKERS' COMPENSATION ACT
Reasonable access to medical information

Notwithstanding the above, an employer may submit additional relevant medical information not already contained in the employee's medical records (i.e., surveillance, prior medical records of which the doctor may not be aware, etc.) to the authorized physician and may communicate in writing with the physician in accordance with the following procedure:


See N. C. Gen. Stat. §97-25.6



NORTH CAROLINA WORKERS' COMPENSATION ACT
Reasonable access to medical information



1. The employer notifies employee in writing of the intended communication and provides a copy of the proposed communication.
2. The employee has 10 business days from postmark or email/fax verification to consent or object.
3. If the employee either consents or does not timely object, the employer may submit information directly to the physician.
4. With a timely objection, the employee may request a protective order to halt the communication until the Commission enters a ruling.

•See N. C. Gen. Stat. §97-25.6



NORTH CAROLINA WORKERS' COMPENSATION ACT
Reasonable access to medical information


EFFECTIVE USE OF SURVEILLANCE



NORTH CAROLINA WORKERS' COMPENSATION ACT
Leave Issues

Employer Must Also Consider Duties Under:

- Family and Medical Leave Act;
- Americans with Disabilities Act;
- The employer's leave policies; and
- Employment contract, if any.




NORTH CAROLINA WORKERS' COMPENSATION ACT
Return to Work

**NORTH CAROLINA WORKERS'
COMPENSATION ACT**
Return to Work

Maximum Medical Improvement (MMI):

When an individual has completed the “healing period.”




**NORTH CAROLINA WORKERS'
COMPENSATION ACT**
Suitable Employment




**NORTH CAROLINA WORKERS'
COMPENSATION ACT**
Promoting Attendance: Suitable Employment


Pre-MMI Return to Work Issues
(for claims arising after June 24, 2011)

- Employee may be returned to a modified job that is within the employee’s work restrictions
- Includes rehabilitation or other non-competitive employment
- Must be approved by the employee’s authorized treating health care provider
- “Make-work” can be suitable



**NORTH CAROLINA WORKERS'
COMPENSATION ACT**
Return to Work

Nothing in [the Act] prohibits an employer from contacting the employee directly about returning to suitable employment with contemporaneous notice to the employee’s counsel.




**NORTH CAROLINA WORKERS'
COMPENSATION ACT**
Return to Work

IS THERE A DUTY TO OFFER ACCOMMODATION UNDER THE ADA?

Yes, to a qualified individual with a disability if it would not cause an undue burden to employer.

Sometimes accommodations will need to be offered under the ADA, even when the resulting position is unsuitable “make work” under the North Carolina Workers’ Compensation Act.




**NORTH CAROLINA WORKERS'
COMPENSATION ACT**
Return to Work

When an employee, who has been injured on the job and placed on workers’ compensation leave, has been released to return to work by the treating physician, the agency shall:

- (1) return the employee to the same position or of like seniority, status and pay held prior to the injury; or
- (2) attempt to place the employee in a position best suited to the employee’s post-injury capacity.

25 N.C.A.C. 1E.0709 (2014)




NORTH CAROLINA WORKERS' COMPENSATION ACT

Return to Work

If an employee who has been on workers' compensation leave has reached maximum medical improvement and been released to return to work by the treating physician refuses suitable employment in keeping with his capacity, the employer may request stop payment of compensation and implement dismissal procedures.

25 N.C.A.C. 1E.0710 (2014)




NORTH CAROLINA WORKERS' COMPENSATION ACT

Remedies for Noncompliance

Motion for Order of Compliance/Form 24

- Employee's refusal to accept suitable employment
- Employee's refusal to accept medical treatment
- Employee's refusal to cooperate with vocational rehabilitation efforts

Unilateral termination of benefits prohibited




AMERICANS WITH DISABILITIES ACT ("ADA")






AMERICANS WITH DISABILITIES ACT

The ADA prohibits an employer from discriminating against a qualified individual with a disability in regard to hiring, job application procedures, advancement, discharge of employees, compensation, job training, and other terms, conditions, or privileges of employment.



AMERICANS WITH DISABILITIES ACT

Two types of ADA claims are recognized: **failure to accommodate** claim (disability, employer had notice, employee could perform essential functions of job, employer refusal to accommodate) or **discrimination claim** (disability, qualified, adverse employment action).

AMERICANS WITH DISABILITIES ACT

Employees and Applicants Covered

"Qualified Individual" is defined as an individual with a disability, who with or without reasonable accommodation, can perform the essential functions of a job he or she holds or wants.



AMERICANS WITH DISABILITIES ACT

An individual with a disability is:

A person who has a **physical or mental condition which substantially limits one or more major life activities** (including working);

A person who has a **record** of such condition; or

A person who is **perceived** to have a condition described above.



AMERICANS WITH DISABILITIES ACT

Duty to Accommodate

An employer must make a **“reasonable accommodation”** for a qualified applicant or employee with a disability unless doing so will cause the employer an **undue hardship** or cause a **direct threat** to the safety of others.



AMERICANS WITH DISABILITIES ACT

Reasonable Accommodations May Include:

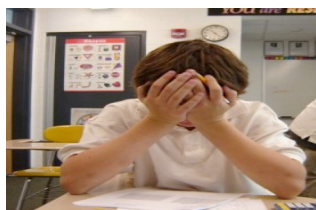
- Part-time work schedules
- Reassignment to vacant position
- Providing equipment or physical modifications to the workplace
- Modifying application, testing or training documents
- Providing qualified readers or interpreters



AMERICANS WITH DISABILITIES ACT

Accommodations which would cause an **“undue burden”** on the employer are not required.

Undue burden is usually measured by **expense** and **resources necessary** to make the accommodation.



A housekeeper requests that her job be modified to accommodate permanent work restrictions of no lifting over five pounds, no bending, and no using her back. Is this a reasonable accommodation?



Probably not, as the essential job functions of a housekeeper require bending and tasks requiring the use of the back.



A nurse injured on the job with permanent light duty work restrictions requests that a full time position be created for her filing charts (which was her temporary, light duty assignment). Is this a reasonable accommodation?



Probably not. The ADA does not require an employer to:

- transfer the essential functions of a disabled employee's job to another employee, or
- create a new position to accommodate an employee.



AMERICANS WITH DISABILITIES ACT

Employers should hold employees with disabilities to the same performance standards as other employees.



“Substantially Limited”

An impairment that is episodic or in remission is considered a disability, if the impairment would substantially limit a major life activity when active.



Recognizing a Request for Accommodation

No specific form of request is required, if the employer has actual or constructive knowledge of need for accommodation.

Employee does not have to specifically mention the ADA or use the word "accommodation."



How to Reasonably Accommodate?

The ADA requires that employer engage in interactive process with employee. Currently the process utilized by the Hospital involves a meeting between Human Resources and the employee to:

- Identify and discuss the essential functions of employee's current job
- Solicit medical documentation and also obtain input from the employee about physical limitations and work restrictions
- Identify and discuss potential feasibility and effectiveness of proposed accommodations with employee
- If no accommodation is identified, review and consider whether additional leave may be an accommodation
- Discuss other available positions within organization for which the employee may be qualified



When is There No Duty to Accommodate?

- If employee is not a covered individual
 - **No disability**
 - **Not qualified** to perform essential functions of job, even with reasonable accommodation.
- If accommodation not reasonable and would cause **undue hardship** to employer
 - Expense and/or resources required
 - Employer's size considered
- If accommodation requested would pose a **direct threat** to the health/safety of employee or others
 - Likelihood and severity of potential harm



AMERICANS WITH DISABILITIES ACT

Leave may be a reasonable accommodation, as long as the leave has at least an approximate end date.

Indefinite leave is not a reasonable accommodation.

Myers vs. Hose, 50 F.3d 278 (4th Cir. 1995).



AVOIDING DISCRIMINATION AND RETALIATION CLAIMS



RETALIATION CLAIMS AND THE EMPLOYMENT AT WILL DOCTRINE



RETALIATION

Avoiding Wrongful Termination and Retaliation Claims

- Document in writing all negative work performance or attitude indications, and make sure all disciplinary action is supported by documentation.
- Documented poor work performance may generally be the strongest support for a termination.
- Ensure that a legitimate business reason exists for all adverse employment actions taken against an employee. Make sure all decisions are analyzed independently from any protected activity or class.
- Carefully scrutinize disciplinary actions relative to ADA related absences, and do not take any disciplinary action relative to workers' compensation absences also covered by the FMLA.



RETALIATION

Avoiding Wrongful Termination and Retaliation Claims

- Remember that an employee who "reasonably believes" that a violation of the relevant statutes has occurred is protected against retaliation, whether or not the complaint actually has merit.
- Avoid, if possible, taking an adverse action against an employee who has very recently engaged in a protected activity. (Use a "like employee" analysis: would you take the same action against another employee who had not engaged in a protected activity or was not in a protected class?)
- When disciplinary action is contemplated or concerns arise that contemplate actions which may be construed as retaliatory, consult Human Resources.



What is an Adverse Act?

- Retaliation against a third person because of his relationship to a complaining employee
- Post-complaint harassment
- Constructive discharge
- Inappropriately severe discipline
- Subjecting an employee to terms and conditions of employment not required of others
- Denial of work hours (material change)



Avoid the "Conspiracy Theory."

Inappropriate comments are not okay just because they are out of the earshot of others.



Remember that what is said at work may sound very different when it is said on the **witness stand**.



Questions





Thank you for your time and attention

**Please call if you have any further questions.
1-800-272-8369**

