The Employment Law Counselor Episode 20

**PLUS Staff:** [00:00:00] Welcome to this PLUS Podcast, The Employment Law Counselor. Before we get started, we like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers or of PLUS. The contents of these materials may not be relied upon as legal advice.

**Victoria Fuller:** Welcome everyone to the Employment Law Counselor Podcast. This podcast is a collaboration between White and Williams LLP and the Professional Liability Underwriting Society, commonly known as PLUS. While our podcast is not legal advice, it is a practical discussion between attorneys that deal with the maze and minefield of labor and employment laws on a daily basis. If you like what you hear. Please give us a five-star review and subscribe so you never have to miss an episode.

Welcome everyone, as I said, these are your hosts, Victoria Fuller and Laura Corvo. Today we're going to be discussing one of the most difficult challenges that many employers [00:01:00] face, and that's navigating the legal protections for disabled employees. These challenges arise out of labyrinth of extremely complex laws, including the Americans with Disabilities Act, the Family and Medical Leave Act, the Pregnant Workers Fairness Act. Each of those has their own state law counterparts or corollaries, which employers have to navigate as well.

Our discussion today will try to shed some light on the many requirements of those laws, explain how they intersect, and the many risks that each law and its interactions with these other laws presents to employers. I note that when we are discussing disabled employees, workers' compensation protections can also add a layer of complication to the mix. We're not going to talk about that today in this podcast, we're just going to focus on disability scenarios that don't involve workplace injury. To give a high-level overview of those other laws.

**Laura Corvo:** Yeah, Vicki. There's really no doubt that the laws [00:02:00] pertaining to disabled employees and the intersection of these laws present extremely difficult challenges for employers. You and I will endeavor today to shed light on these laws as labor and employment attorneys who serve as both defense counsel and as attorneys who regularly counsel employers on these issues.

We are really excited to also have a special guest with us today who can give a slightly different perspective on the risks presented by these laws. Please welcome to the podcast, Chris Brooks. Chris has over 25 years of experience in the insurance industry and is currently an assistant vice president with Berkeley Select, an insurer who provides management and professional liability insurance products to businesses throughout the country.

Welcome Chris. How are you doing today?

**Chris Brooks:** I'm great, Laura. Thank you both for having me on the podcast. I'm very excited to talk about this topic.

**Victoria Fuller:** Chris, we're actually, we're really excited to have you here to have your perspective. I think what might be [00:03:00] helpful is let's start out by just, why don't you just tell us a little bit about the profile of the insureds who Berkeley works with?

**Chris Brooks:** Yeah, so we underwrite EPL for small to mid-size private companies and nonprofits. We also write a few public companies with, most of our insured, under a hundred employees. We're very industry diverse. We’re comfortable with various sectors like hospitality-- so that includes hotels and restaurants-- retail, professional services (including law firms[and] software companies), office-type environments, construction, manufacturing and things along those lines.

**Victoria Fuller:** So interestingly, that's the perfect audience for this particular podcast because they typically don't have either a dedicated HR professional or even an HR department. Sometimes you see a manager who is doubling up as the HR person for the company, so this is a great contribution to this discussion.

Now, in [00:04:00] underwriting, you see certain risks from the employer in terms of how they look at disability claims. Can you elaborate a little bit on the kinds of things that you see that would create a greater risk?

**Chris Brooks:** Yeah, certainly. Small and mid-size employers generally don't have, or generally don't always have, a robust HR manager, let alone an HR department. [This] can present challenges in terms of not having an employee handbook or one that's outdated or poorly implemented. This can create ambiguity around company policies and procedures [and] undefined reporting structures. For example, if you're an employee and your issue is with your boss at small company, who do I go to? Who do I report this issue to? If it's someone I can't report to my boss. Who can I go to?

A lot of these small companies without an HR representative in [00:05:00] place can lead to poor documentation procedures-- failure to properly handle disciplinary actions or complaints properly. Inconsistent policy enforcement can be very frequent in these smaller to mid-size companies and can create perceptions of favoritism or discrimination. [This] also goes hand in hand with limited training and compliance awareness. From an underwriting standpoint, these gaps increase both the frequency and the severity of potential claims.

**Victoria Fuller:** Yeah, 100%. I think both Laura and I see a lot of those issues in our practice on the defense side. Just real quick, Berkeley also has a program or a product for its EPL insureds, is that right? Can you tell us about it?

**Chris Brooks:** Yeah, we have a risk management tool that is included with each policy; it's called Zywave. Each insured has access to HR tools. There's a [00:06:00] employee handbook creation tool, [including] specific laws that pertain to states no matter what state the insurer is located in, or if they're located in multiple states. They also have an access to a hotline where they can ask HR specialists questions related to EPL risks and exposures they might have coming up.

**Laura Corvo:** Chris, before we dive into some of the trends you're seeing from your chair, especially the trends affecting some of the smaller businesses who you cover, it probably makes sense, especially for those smaller businesses, for us to take a step back and do kind of a high level overview of some of the laws that come into play here when you have a disabled employee.

The first law, of course, is the Americans with Disabilities Act, which has multiple counterparts. In a nutshell, it protects employees from discrimination on the basis of disability. It also requires employers to provide reasonable accommodations to disabled employees so that they can perform the essential functions of their job.[00:07:00]

Vicki, can we just start with the discrimination protection and can you walk us through it and what the requirements are?

**Victoria Fuller:** Yeah, I'd love to, Laura. I know we're going to break this down on the granular level, but I think it's important to do that when you're talking about how do you deal with the disabled employee's needs and how do you support them? I think sometimes it's very easy for an employer to get overwhelmed and thinking through the steps makes it a much more manageable process. Let's take it one step at a time, through the analysis.

As you said, there are several layers of protection here. One thing I want to emphasize is that these protections are not mutually exclusive. Sometimes different ADA issues come up with respect to the same employee, so you need to keep that in mind. It's not just the intersection of the ADA with the FMLA, with the PWFA, it's sometimes the ADA and the ADA.

When we talk about discrimination, for example, we're not talking about [00:08:00] one thing. We're actually talking about a couple of different scenarios. The first is the more traditional one, where the employer takes an adverse employment action against the employee because of their disability. It's not just that you take an adverse employment action. It has to be on the grounds of their disability. The second issue is hostile work environment. Again, it has to be a hostile work environment that's hostile because of the person's disability. It's not just workplace bullying It's not just an uncomfortable environment or a bad boss. It has to be something related to the disability.

 Let’s talk about the first one, the adverse employment action scenario. What constitutes an adverse employment action can be much, much broader than just you were fired or you were demoted.

**Laura Corvo:** So Vicki we're looking at things like, you know, suddenly you're transferred, your shift schedules changed, or you're required to work more than 30 miles away from your previous [00:09:00] location. Things along that nature. Right?

**Victoria Fuller:** Yeah, exactly. It's anything that would be a negative change to the term or condition of the employee's work environment. Again, just to harp on the point, it has to be because of their disability. I just want to emphasize when you think about what's an adverse employment action, using common sense, it's something that you wouldn't like. Think about [how] it might be an adverse employment action. [ For example], transferring someone to the third shift, just as you said, nobody wants to go from first shift to third shift without being consulted first, doing that would be an adverse employment action or could be.

Now let's talk about the second type, which is that hostile work environment. When people think of this, again, they usually think of the sexual harassment type of case. But you can have a hostile work environment based on disability, I mean really any protected category. [You need to] use the same analysis as you would for that other type of claim, like a sexual harassment claim. [00:10:00] “Is it severe? Is it pervasive?” What you're really looking at is “ Is the employer tolerating an environment in which the disabled employee is made fun of or is bullied because of their disability?”

Think about a situation where an employee has a mental health condition and another employee does something to try to exacerbate it. I raised this because there is an actual case on this. It's a new case filed in the Eastern District of North Carolina. The employee alleges she had an anxiety disorder, and she had a specific fear of dolls. She had told her manager about this particular fear and about these mental health conditions, and he put a Chucky doll in her chair.

I mean, if someone put a Chucky doll in my chair, that would be disconcerting, right? So I think when you're talking about a hostile work environment, keep your mind open as to what the circumstances are, because this is all very fact [00:11:00] specific.

**Laura Corvo:** Vicki, I think one of the thing that's interesting here under the ADA is we're covering not just disabilities, but perceived disabilities as well. If you think the person has a mental health disability and you treat them like that-- you call them names, you put the Chucky doll on their desk or do something-- even if they don't in fact have the disability, they could still have a discrimination claim based upon your perception of them as disabled.

**Victoria Fuller:** That's a really, really good point, Laura, and definitely one that our listeners should keep in mind.

**Laura Corvo:** So if the ADA's discrimination requirement were the only thing we had to worry about, then we'd kind of be in like Title VII land. We probably wouldn't be having this, this program here.

The ADA is more than your run-of-the-mill discrimination statute. It not only prevents employers from discriminating against disabled individuals, it also requires the employer [00:12:00] to provide reasonable accommodations and engage in something we're going to call the interactive process. This gets really complicated.

Vicki, can you start to just walk us through this very tricky, reasonable accommodation requirement of the ADA?

**Victoria Fuller:** Yeah, for sure. Under the ADA, and again, we're going to break this down piece by piece. The covered employers are required to provide reasonable accommodation, not just any accommodation, it has to be reasonable, to qualified disabled employees. So again, not just any accommodation and not just any disabled employee, it has to be a reasonable accommodation to a qualified disabled employee. Reasonable accommodations can take many different forms.

**Laura Corvo:** We're talking things like what Vicki, job duty modifications-- giving somebody an ergonomic chair. Different equipment, specialty equipment to help they're disability. I think you take varied forms, is that right?

**Victoria Fuller:** Yeah. [00:13:00] Even not just equipment too, Laura, but also think about restrictions on hours, time shifting, anything that can help the employee perform the essential functions of their job.

What is not reasonable and is not required, therefore is a modification that would permit the employee to not have to do the essential functions of their job. There are other things that are as a matter of law not reasonable. The big one is indefinite leave, and that is a minefield in and of itself.

Employers also don't have to hire another employee to do the disabled employee's job for them. An employer also doesn't have to provide an accommodation if it presents what's called an undue hardship. It has to create a significant operational difficulty or a significant expense for the employer.

It's not enough to say it's going to cost us some money, or it's going to cause other employees to have to take on [00:14:00] some of the work of the disabled employee, particularly when it's on a temporary basis. It really has to be a significant, serious issue. We see this all the time, right? Other employees get grumpy because they're doing the disabled employee's work while they recover from something or they take on certain job duties. We have to really be able to say, ‘This rises to the level of an undue hardship” before we can say, “No, we're not going to do this.”

What ends up happening sometimes, too, is the employer's trying to do the right thing and so they make an accommodation, which then over time becomes less and less and less sustainable. That creates its own set of problems because at first you were trying to accommodate them, [but] now you can't. At what point did it become an undue hardship?

So my point here is, we have to really dig deep into what is reasonable when we're trying to go through the interactive process with the employee.

**Laura Corvo:** Vicki, I think one of the [00:15:00] undue hardship analysis we're seeing a lot of post-COVID is employers who are trying to deny people work from home accommodations. Right? Pre-COVID, almost everyone came to the office and it was pretty easy to establish that in order to do the job, you had to be in the office.

Post-COVID we all learned to do our jobs remotely and as people started to bring employees back into the office, employees raised their hand and said, “Well, I can't come back because I have a disability.” Some employers, I think, take the position that they can outright deny [a] disabled employee’s request for an accommodation for a work from home accommodation simply because they've brought employees back to the office.

You can get into trouble there because you've already shown that that job can be done remotely. You're going to need to go through the interactive process and really try to establish that in-person presence is necessary for the job, and that it will create an undue [00:16:00] hardship to allow you to continue to have that employee work remotely. It’s something we're just seeing tons and tons of cases with, post-COVID.

**Victoria Fuller:** Yeah. Just to flag the issue, tons of cases-- particularly involving employees who say, “I have a mental health condition. I have anxiety. I have PTSD, and I have to work from home as a result in those scenarios.”-- you still have to go through the interactive process. You still have to go through each of the steps. Do not automatically deny it because you have to ascertain all of these things. Is the person disabled? Are they a qualified, disabled person? Is there a reasonable accommodation?

Don't skip the process. Go through it with the employee, even if you think they might not be truthful and they're really just trying to work from home. Still go through all the steps.

**Laura Corvo:** A hundred percent agree, Vicki. Chris, what trends have you seen related to disability claims as an underwriter? What claims has your team at Berkeley seen?

**Chris Brooks:** Yeah, we're definitely seeing a noticeable uptick [00:17:00] in disability related claims over the past few years. Mental health as a central factor and focus in these claims is very prevalent, mental health conditions like anxiety, depression, PTSD, ADHD [and] various neuro divergencies. With employees more willing to disclose these conditions, employers are unsure how to respond, so we're seeing more allegations of failure to accommodate a hostile work environment and even retaliation.

A big part of that is failure of interactive process like, like Vicki had alluded to earlier, how important that is. One of the biggest accommodations with these mental health conditions is remote work and working from home. Along with that, there's several, in other terms, invisible disabilities --bias when it comes to autoimmune disorders, chronic fatigue, back pain-- things that aren't necessarily physically prevalent to an outsider that these [00:18:00] employees are dealing with.

From an underwriting standpoint, we're paying closer attention to how employers are handling these accommodation requests--whether they're providing management training, and how robust their documentation procedures are. We look for proactive risk management with these various insureds.

One case that kind of comes to mind was an account I had underwritten a while back; it was a tech company. The employee had disclosed a diagnosis of generalized anxiety disorder and an accommodation was made. During their process of employment, they had switched managers. While the first manager was very supportive, the second was not, so then they were put on a performance improvement plan and the employee was subsequently terminated. And so the process kind of fell through the cracks, so to speak. They had the policy and procedures in place, but they weren't consistent from manager to manager. That is why it's so important that training [00:19:00] and, and the interactive process is so vital.

**Laura Corvo:** I think that's an excellent point, Chris. I think, like you said, how the manager handles the disabled employee through both documentation and dialogue is really critical.

I would mention that in addition to the discrimination and reasonable accommodation aspect of the ADA, there are also a couple of other protections the ADA provides. One of them is an interference claim. That is if you prevent the employee from exercising their rights under the ADA, you create an atmosphere which makes it difficult for that employee to go ahead and request that reasonable accommodation or take the time off or use the equipment or other accommodations that they've received. You know, that's problematic.

There’s also a retaliation component. We see this a lot where the employee requests the reasonable accommodation, the company grants [00:20:00] it, but then everybody's mad at that employee or giving the perception that they're somehow mad at the employee. That's, you know, just ripe for retaliation claims.

In my experience, retaliation claims are often the most difficult to defend because it's difficult to believe an employer really wants to discriminate against an employee. It's much easier to prove, in my opinion and experience, that the employer treated an employee differently once they were put on the spot, once the employee complained or exercised a right. Juries, like, eat that up. I think it's really something that we miss sometimes when we talk about these claims. It's not just, “How do we get through the interactive process? How do we accommodate? How do we not discriminate, but also how do we not retaliate?”

I also should mention-- Chris, you said a lot of your insureds are smaller businesses-- the ADA's threshold is 15 or more [00:21:00] employees, which is relatively small. There are many state laws that bring it down to one. So, [with] these topics that we're talking about, smaller employees out there [should] listen up because you're going to be impacted by them.

With that said, let's just take a quick step back as we continue to break down what these obligations are. I guess, Vicki, could you walk us through what is a disability? How do we know if the employee is actually disabled?

**Victoria Fuller:** Yeah, Laura, this is a good question. It is one that is somewhat of a moving target. What is a disability today versus what was a disability 20 or 30 years ago is a different story.

The definition is “a physical or mental impairment that substantially limits one or more major life activities.” [This definition is] very technical legalese. In reality, a disability can be any number of things, but [00:22:00] in the first instance what you need is a diagnosis. We'll talk in a second about the medical documentation.

I would not at the outset dismiss something because it's an injury. “You had a car accident. You're just injured, [but] you're going to get better.” Not necessarily, there could be a disability in there. You have to go through the whole process to make sure that you're complying with your obligations under the ADA. I guess the overarching like teaching moment there is, don't assume that you know whether this is a disability or not, without completing the process.

Disabilities can be temporary. They can be episodic. They can involve things, like an autoimmune disorder that have flareups and then kind of go into remission. Disabilities can manifest in many, many different ways. As I said, that can also be very blurry in terms of what is an injury[and] what is a disability.

You might have an employee who has bouts of anxiety, very type A [00:23:00] person. That's not the same thing as an actual diagnosed anxiety disorder, which is a disability.

Like I said, the difference between accident or injury and disability, an injury can progress to a disability. Maybe they have that car accident, they get injured, but they develop a chronic condition like pain or they have difficulty sitting for long periods of time. So, we really have to go through the whole process and not assume that we understand what a disability is, just based on what the employee initially tells us.

**Laura Corvo:** Chris, has your team seen any trends in the standard for disability evolve, especially when it comes to mental health issues?

**Chris Brooks:** Yeah, definitely. Since COVID, we've seen an uptick in mental health related disability claims, specifically. Like I said before, [we’ve seen] everything from depression to anxiety to neurodivergent conditions like [00:24:00] ADHD and autism spectrum disorders. According to workplace statistical data that I found when researching for this, for the second year in a row in 2024 mental health conditions were the most common reason employees requested an accommodation.

To add to that, the pandemic didn't just impact mental health, it kind of reshaped the expectations of what reasonable accommodation is. Remote work became normalized, and so now legal and HR teams are increasingly being asked, “Can this employee perform their essential duties from home?” What revolves around that is a big aspect of return to work is collaboration and spontaneous creativity that happens when people are together, but is that necessary for a disabled person? Is a reasonable accommodation of allowing them to work remotely fair, right? It's led to a greater flexibility, I think, in [00:25:00] how employers have accommodated mental health conditions. It's a shift that's still evolving. Mental health's no longer on the fringe of employment law or in EPL underwriting.

**Laura Corvo:** Have you seen a trend in the types of mental health disabilities that employees are claiming? I think there was a period where we might've seen things like anxiety as the main claim or depression. But it's become a lot more diverse, I think, especially post COVID.

What have you guys seen?

**Chris Brooks:** Yes, definitely. We're seeing a definite rise in both neurodivergent and mental health related disability claims. No longer is it just a personality issue with someone. They have a diagnosable condition now, right? That's something new.

 At the same time, mental health claims are increasing both frequency and complexity. They often involve expert testimony, nuanced assessments, and a deeper look at how the employer handled the interactive process. It's no longer about whether it [00:26:00] qualified as disability, it's about how well the employer responds, documents and adapts to support that employee.

**Victoria Fuller:** Chris, what about workplace stress?

I know this is an issue that comes up from time to time. Have you seen any increase in the eggshell plaintiff issue-- an individual with a mental health disability that made them more sensitive to workplace stress?

**Chris Brooks:** Yes, we are. We're seeing an increase in claims where the employee has a pre-existing mental health condition like anxiety, PTSD, or depression-- kind of back to your example with the Chucky doll, right? It's employer conduct that might not seem extreme on its face. It's an innocent, like putting a doll on a chair and staring an employee, but it has a disproportionate impact on that particular employee.

It's important to understand that under the ADA and similar laws, employers take the employees as they are, right? We’reat means if it's an action, like a performance review, a change in [00:27:00] schedule, or even a joke, it can trigger a severe reaction with unknown ramifications, right? We're seeing more of these claims involve allegations of emotional distress tied to routine workplace interactions, claims that where an employer failed to accommodate stress related limitations and situations where the employer knew or should have known about the employee's heightened sensitivity-- like your example earlier with the Chucky doll.

From an underwriting standpoint, this kind of reinforces the importance of manager training documentation. I know I’ve repeated that a few times, but that's how important it is, a very thoughtful and individualized approach to employee relations. It's not just about what was said or done, really it's about what was received and especially when mental health is involved.

**Laura Corvo:** And I guess the fact that there has been this increase in the types of disabilities that are out there, right? [00:28:00]--different mental health conditions, employees claiming that they're disabled as a result of physical disabilities.

It's also important, I guess, to go back for a step to the ADA and make employers aware that while employers have to accommodate disabilities, they have to accommodate a qualified, disabled person, right? They're not accommodating every disabled person.

Vicki, can you kind of explain who is a qualified disabled person? Who is entitled to the protections, the ADA? This is a bit of a nuance that we kind of have to parse through.

**Victoria Fuller:** Yeah, and it ties together with what we were talking about earlier. A qualified disabled person is one who can perform the essential job functions with or without a reasonable accommodation. You'll have a disabled employee.

Like Chris mentioned, maybe they have an invisible disability. They don't really need an accommodation at this moment. Maybe they'll need one in the future, but they don't need an [00:29:00] accommodation. So, they're a qualified, disabled person because they could perform their job, or they can perform the job with a reasonable accommodation. Maybe they need a standing desk and then they're fine. They can do their job as long as they don't have to sit for long periods of time. Maybe they need to time shift-- instead of starting at nine, they need to start at 11. Then they can do their job just fine. As long as they can do the essential functions of their job with that reasonable accommodation, they are a qualified, disabled person.

**Laura Corvo:** Once we have a qualified individual with a disability, Vicki, the next question is, “What is the reasonable accommodation that the employer has to provide? What is reasonable?”

**Victoria Fuller:** Well, Laura, what do you want it to be? In seriousness, now we're going to get into the interactive process. Laura, you do this day in and day out. Walk us through it.

**Laura Corvo:** The way that ADA works is it says to the employer, once the employer discloses to you that they have a disability and that they may need something to help them [00:30:00] perform their job, you have to engage in what's called the interactive process.

The interactive process is this really gray, wishy-washy thing that employers have to engage in. You have to kind of go back to that employer and say, “Well, how can we help you? How can we help you do this?” Then you have to do an analysis of whether or not it's reasonable and going to create an undue burden for you.

Going back to Chris's point, you really need a skilled HR professional involved in this process. You really need to be mindful of the documentation in this process and the way the dialogue is communicated to the employee because everything can be misconstrued and not buttoned up. I see it time and time again. It's where a lot of employers fail.

What I routinely counsel employers to do when they get a request for any sort of an accommodation or where an employee just discloses to them that they have a disability and needs [00:31:00] something. Don't just say, “Yes, of course we'll give that to you.” And don't just say, “No, of course we can't give that to you.”

 The first thing you should really do is get a doctor's note, right? Have a doctor explain to you what the employee needs. Now we're not asking for information on the condition of the employee or what medications that employee is taking. All that doctor is telling you is, can an employee perform the functions of their job? If they need some accommodations, what in the doctor's opinion is the right accommodation.

Oftentimes in both litigation and just counseling, this kind of makes or breaks your case. You really got to use that doctor and go back and forth with that doctor to understand what the accommodations are that you might be required to provide the employee.

**Victoria Fuller:** Actually, I just want to chime in on that. You're 100% correct, Laura, in the sense that many times you have to go back and get [00:32:00] better documentation because you need to know what the restrictions are. Sometimes you'll get a note that just says, “Mary Jane needs to work from home.” Why? It just doesn't explain anything more than that, or it won't be specific enough to understand what the actual restrictions or limitations are. Don't hesitate where you think you need to get more clarifying information.

One thing that it should not do is dictate the specific accommodation that the employer should give because this, as you said, Laura, is an interactive process. You need to know what the restrictions are from the provider so that you can engage in that dialogue to determine what the accommodation is. The doctor should not be just dictating the accommodation because the doctor doesn't know what's reasonable for your business.

**Laura Corvo:** To that point, Vicki, I think one of the documents that employers have to button up, as Chris said, is the job description, right? What does that job entail? I [00:33:00] often have the employer go back to the doctor with the job description and say, “Here it is. Can this employee do it? Can they do this and what can't they do? What do they need to do this if they're not able to do it?”

It's really, really important that you have those job descriptions, and also that your employees who are in that job are actually performing those job duties. If the job description says, “Oh, you have to lift a hundred pounds on a daily basis” and nobody's lifting a hundred pounds, it's going to be hard to accommodate somebody who can't lift a hundred pounds if nobody else is doing that, right? [Its unfair] to say you can't perform the essential functions of your job.

You have to understand what your job descriptions are, what they say and what the job, the employee who's coming to you for an accommodation, actually requires them to do. I think that's a huge part of the interactive process to understand what is it the employee does, and then [00:34:00] how you may or may not be able to modify that or assist that employee performing those duties.

**Victoria Fuller:** Yeah, I think Laura too, as Chris said earlier, one of the issues with smaller, mid-size employers is they don't always have that job description, or sometimes it's really out of date. That doesn't mean we abandon the interactive process. That means we look at what the actual job duties are of that employee, right? Then we have to compare the restrictions against the essential functions, not every single thing that that employee has to do, but what are the essential functions of that job? What must [they] be able to do to do their job?

If they work in a group home and they might have to restrain a resident, maybe they do have to be able to lift a hundred pounds or be able to restrain a 200-pound person. That would be an essential function of the job. If you work as a cashier at supermarket, you're probably not lifting a hundred pounds or restraining anybody. You really have to look at what are the actual job duties for that job, and then look at it against the [00:35:00] restrictions.

All right, so I think we've covered the ADA. Laura, can you walk our listeners through the FMLA and how it comes into play for disabled employees?

**Laura Corvo:** Sure, Vicki. If you're not confused enough yet, let's throw in the FMLA. The Family and Medical Leave Act, which has been on the books since 1993, is one of the laws I get the most questions from my clients.

I mean, people still don't understand exactly what all of the requirements are, and it has a bunch of very rigid rules to it. In a nutshell, what it does is says certain employees can get up to 12 weeks of unpaid leave for certain events. Those events include things like the birth adoption or placement of a child, the employee's own serious medical condition--which is how we get the disability to come into play—[ability] to care for a seriously ill or injured family member or for [00:36:00] reasons related to the family member's military service.

The leave provided, that 12 weeks we talked about, that can either be in a 12-week continuous block, or in some situations it may be intermittent--where the employee's taking a few hours off a day, a few days off a week. They're still coming into work for portions of the day and, and the employer's giving it to them intermittently, which just requires the employer to make sure they're counting the time off. Remember, this is 12 weeks and how we count that time is going to be important.

The FMLA typically applies to larger employees, employers rather. In order to be eligible for the FMLA, the employee has to have worked for at least 12 months for the employer and at least 1,250 hours in the past 12 months. So, we're talking about somebody who's more than part-time, and they need to work at a [00:37:00] location within the company. That's where the company employs at least 50 employees within a 75 mile radius,

 For remote employees-- so you have a company that's basically based in New Jersey, but you've got a remote employee in, let's say, Iowa--that 75 mile radius concerns where the employee reports to. If that employee's reporting to the New Jersey office, they're eligible for the FMLA.

Some states, many states, have their own family and medical leave laws, which drastically drop the threshold requirements I just described. You could just have one employee and have these obligations. You may have more time off that you're required to give under certain state laws, so it gets really, really complicated.

There are notice requirements that you have to provide to employees who are eligible for FMLA. Once you approve the leave, you [00:38:00] have to advise the employee of their right to take the leave. It's a very complex statute, but it's a rigid statute. Which basically says, “Hey, if you've got a medical condition, we're automatically giving you this 12 week off unpaid.

**Victoria Fuller:** Laura, I just want to chime in here. You mentioned earlier that there's both continuous leave and intermittent leave. I think intermittent leave under the FMLA is where a lot of employers get tripped up because in trying to do the right thing, particularly for smaller employers, they don't track it. They don't go through the FMLA process. They don't collect the paperwork. They just let the employee take time off here and there and everywhere, but after a while it starts to get burdensome. They say, “Well, the employee's been taking time off, but it wasn't being counted under the FMLA because they never went through the process.” Then they go through the process under the FMLA, that's when the clock starts ticking, right? So, we have to be careful about making sure, again, we're going through all the steps, all the processes, [00:39:00] to make sure we're counting that time to protect the employer if they at some point say, “We can't do this anymore, it's too much time off and we can't run our business.”

**Laura Corvo:** This is where Chris's point of having a trained HR staff and really good documentation comes into play because the FMLA has a lot of required documentation that you're statutorily mandated to provide the employee. You do have to, kind of, provide that documentation, know what it is, know what it says, and follow this very rigid process.

**Victoria Fuller:** Exactly. Okay, so we talked about FMLA. We talked about ADA. Laura talk to us about when they intersect.

**Laura Corvo:** Yeah. Let me just, kind of, explain the difference between the two laws, right? So, The FMLA, as I said before, covers more than just disabilities. It also pertains to employees who might need to take time off for family related reasons-- they had a baby, or they have a seriously ill family member who they need to take care of. The ADA [00:40:00] only applies to disabled individuals.

The FMLA, as I said before, is this very rigid statute, right? It has these very specific requirements, and you've got to check these little boxes. The ADA, on the other hand, is this wishy-washy gray statute that requires you to engage in an interactive process, which at reasonable accommodations, which is very difficult to define.

You kind of have two different types of requirements here. You're entering two different, almost, universes when you're dealing with both statutes. A lot of employers will think, “Well, look, I've checked all my boxes under the FMLA, so I'm done, right? I don't have anything left to do.” But they forget about the ADA and it's kind of wishy washiness, right?

There might be times where an employer needs to relax its time and attendance requirements, provide [00:41:00] additional time beyond what the FMLA provides if it's a reasonable accommodation under the ADA.

You have somebody who is disabled, they need time off. Automatically you're going to be thinking, “Are they eligible for FMLA? Well, I don't qualify under the FMLA because we're not more than 50 employees. I'm not in a state where I have an FMLA requirement, so I don't have to provide that accommodation. Well, you might because it might be a reasonable accommodation under the ADA

“I've provided that employee 12 weeks already. I'm done.” Not necessarily because the ADA may say, “Hey, you need a little bit of more time to provide because it's a reasonable accommodation that that 12 weeks goes to 14 weeks or 16 weeks because that's just something reasonable you need to do.” When the two laws intersect, it's probably one of the most complex things we see our clients struggle with.[00:42:00]

**Victoria Fuller:** Yeah, I’ll note there are so many circumstances in which this comes up. [For example,] take a pregnancy where you have an employee who goes out to give birth and take care of their child then after they have the child, they develop postpartum depression. Maybe they need a couple more months out to get treated for that depression. They're coming back to work. They just need a couple more months under the ADA. There’s a defined time period. Maybe the doctor's note says they need two more months of treatment, then they're coming back.

The flip side, which is the tough one, is the indefinite leave scenario. The tricky part there is sometimes you get the note that says, “They're coming back in six weeks.” Then you get another note at that point saying “They're coming back in six more weeks.” The can just keeps getting kicked and kicked and kicked in. When are they coming back to work? When the employer says, “Okay, we're really done. This is beyond reasonable.” That is a very gray line.

I would not suggest employers handle [00:43:00] that themselves. That's where I would bring in counsel to help guide you through the process. It's very difficult to know when to cut off leave after FMLA has expired, to know, “Okay, we're clear here. This is indefinite. They're not coming back and we're ready to pull the plug on it.”

**Laura Corvo:** Yeah, Vicki, when you add a pregnant employee to the situation, you bring in another law, and that's the Pregnancy Workers Fairness Act which requires employers to provide reasonable accommodations to employees who are pregnant or have conditions related to childbirth. Those reasonable accommodations can include things like the opportunity to take restroom breaks, to drink more water, to sit instead of having to stand for long periods of time.

What the Pregnancy Workers' Fairness Act says is, as a pregnant person, you may not be fully [00:44:00] disabled and not able to perform the essentials of functions of your job, but for a temporary period of time, we can adjust those essential functions. We know you're in this temporary situation; you're not going to be pregnant forever, right? It may mean that we're going to allow you to work a reduced hour schedule or change some of the requirements of your job because you're pregnant. They look at the pregnancy as a special condition.

One of the other things that's unique about the Pregnancy Workers' Fairness Act is also that while with the ADA and the FMLA we're always after the medical documentation, the Pregnancy Workers' Fairness Act actually says, for certain accommodation requests, you actually can't request a medical accommodation because it's so reasonable for you to give this to a pregnant woman. Anyone who's been pregnant or knows anyone who's pregnant knows that pregnant women go to the bathroom more often. [00:45:00] Additional bathroom breaks seem reasonable. You need to drink more water, so a water break seems more reasonable. They probably shouldn't be lifting more than 20 pounds, so that is a reasonable accommodation. It's just common sense. That you don't need to force that woman to go to get a doctor's note saying that they have to be accommodated.

**Victoria Fuller:** Yeah, I just want to reinforce the point you made earlier that when we're talking about a reasonable accommodation under the Pregnant Workers' Fairness Act, that is not the same thing as a reasonable accommodation under the ADA. Under the ADA, the accommodation has to enable the disabled employee to perform the essential functions of their job, whereas the Pregnant Workers' Fairness Act says, “We understand that you might not be able to perform the essential functions of your job, but it's temporary.” It can still be a reasonable accommodation, even if the employee cannot perform the essential functions for a short time while they're pregnant.

**Laura Corvo:** [00:46:00] Chris, now that we have everyone's head spinning, with all of these laws in play, there's exposure, obviously, for a host of claims-- ranging from discrimination to hostile work environment to failure to accommodate to interference[and] retaliation. In your experience, are disability claims more expensive for employers to defend, given all the complexities that we've just talked about today?

**Chris Brooks:** Yes. While they're not as costly as sexual harassment claims, those remain the leader in the clubhouse, disability related claims definitely are becoming more expensive. That's due to mental health expert fees-- for testimony[and] for cases-- non-economic damages, so emotional distress. Things like that are becoming increasingly more costly [ along with] longer resolution timelines for these claims.

**Victoria Fuller:** Chris, what about settlement values of these claims? Are you seeing any trends in that direction?

**Chris Brooks:** Yeah, the settlement values are definitely increasing along with defense costs.

 [00:47:00] The settlement values kind of go hand in hand with the increased non-economic damages. Those are kind of hitting us very hard right now. Also, one thing I wanted to point out is with these increased costs the average cost of a reasonable accommodation is less than $500. A lot of times there is no cost involved. I think it's important for employers to keep that in mind when assessing and engaging in the interactive process, that it doesn't cost a lot. If you don't, the damages can be far more excessive.

**Laura Corvo:** Yeah, that's a great point. I always say to employers too, “When you're dealing with this, sometimes it's worth either engaging your HR person or engaging counsel for a few minutes just to see if you're doing this right before you get involved in one of these claims.”

Chris, what are your underwriters looking for when they're issuing or renewing policies to employers when it comes to how they treat [00:48:00] disabled employees?

**Chris Brooks:** Yeah, I mean, when we're looking at renewals and new business, we're really focused on understanding the employer's risk profile from both a legal compliance and a cultural standpoint. We look for a combination of both objective and data and qualitative indicators.

Key things we look for are the HR infrastructure. Like we said multiple times, a lot of these smaller employers don't have robust HR infrastructure, so what do they have in place? What are they doing? Are they utilizing outside counsel? Are they utilizing HR tools? Do they have an employee handbook, and do they have policies in place? We want to see that it's current, and it's reviewed by an attorney. Do they have training programs that their managers and employees attend regularly on harassment and DEI and ADA compliance?

One big thing is claims history—frequency[and] severity of prior claims. Having a prior claim isn't always a [00:49:00] bad thing. It gives us insight into how they handled the claim, how they handled the interactive process [and] what they did. What did they document? Is it a recurring issue? Those are things that give us insight. A lot of times they don't have claims. They’re claims free; that’s great, but what is really going on behind the scenes? That gives us insight into what this insured really is like.

 Kind of going hand in hand with training programs is the use of employment council and risk management resource, like I said. What are their remote work and accommodation practices? What is leadership like? What's the culture there? Those are all things that that we look at when we're assessing both a risk as new business and renewal for EPL insurance.

**Laura Corvo:** Is that the same analysis you're looking at when it comes to the cost of premiums?

Is there something that drives up the cost of the premium?

**Chris Brooks:** Yeah, pretty much. There's three main factors that we look at [00:50:00] when it comes to premium. The biggest one is adverse claims history. Do they have frequent claims? Do they have severe claims? If you're an employer with 10 employees and you have 10 claims, that's a frequency issue. If you have 500 employees, 5 to 10 claims, it might not be so bad. Do they have open or unresolved claims at the time of renewal? That's something that can drive a premium. Patterns of similar allegations is something that we look at. Is there a systemic issue? Do they have other factors?

Second thing we look at is risk management practices. Do they have a current employee handbook? Do they have an HR department? Do they have adequate training?

Then organizational processes. Do they have high turnover? Is it a toxic workplace? One thing I look at is, does the claim involve the owner? A lot of the time, not necessarily a manager, but there's a trickle-down effect. If the [00:51:00] owner is, if he's harassing people, if he's not engaging in that interactive process, if he's kind of cause of these claims, is that a wider systemic issue within the company? Are they resistant to making accommodations?

Are they inflexible with return to work?

Is there a lack of engagement, historically, in the interactive process? These things aren't easy to kind of get out of. I'm sitting behind a desk, I'm looking at an application. I don't necessarily have all this insight, but you kind of weave your way through it and look at their website, prior claims, their application, how they explain how they handle claims. Those are all things that go into the premium determination and risk profile of a particular insurer.

**Victoria Fuller:** That's great insight. On that note, should we talk about some best practices? I think some of our best practice advice is going to dovetail with what Chris was just talking about.

**Laura Corvo:** Yeah, so I think Chris, like you said, we want to make [sure] the HR [00:52:00] people are trained at handling this, right? [Make sure] there is an HR dedicated professional who is either working for the company or an outside employment council or PEO or someone to provide the employer, especially those smaller employers, with just guidance in this area. It gets super complex, and there's just so many minefields that the employer can step into.

**Victoria Fuller:** Yeah. I think you made this point earlier, Laura. Making sure your bottom line managers are trained to recognize disability issues, [training them] not to handle them on their own but to elevate them to HR or whoever's in the reporting structure.

This is where a lot of employers end up getting in trouble.This is where a lot of interference claims come out of. The manager gets requests for accommodation and the manager says, “Yeah, you don't want to request that. You don't need that. You are just going to cause more work for the other employees on the team.” No, [the] manager should not be [00:53:00] doing this. Get it to HR or whoever you're using to deal with your request for accommodations or other disability issues. Make sure they know not to handle it themselves.

**Laura Corvo:** Yeah, and you've always got to update your handbooks. The handbooks should have a clear policy on how you handle disability accommodations. If you are subject to the FMLA, you should have an FMLA policy. If you have multiple states and a lot of employers as a result of remote work, employees in different states may have family and medical leave obligations in different states that will come into play. They have to make sure that their handbook, or at least the state supplement of their handbook, addresses that. There should be some policy dealing with how pregnancy accommodations are dealt with, including breastfeeding and the other accommodations that are required under the Pregnancy Fairness Workers' Protection Act.

**Victoria Fuller:** Just to harp on that for a second, Laura, [I] just [want] to remind our listeners that [00:54:00] the handbook is as much of a training tool or guidance for your managers as it is for your employees. Making sure you have these policies is important so that if a manager themselves is not familiar with what to do, they can use the handbook for guidance. It's a multipurpose tool

We mentioned this earlier too, but just making sure you have updated, well-crafted job descriptions that clearly identify the essential functions of the job [is important]. Make sure they're updated to reflect changes in those essential functions, particularly for small employers. I think this is one area where they just lack, job descriptions, pretty frequently. It creates a problem trying to establish what is an essential function of that job when we've never written it down, and maybe over time the job itself has morphed.

**Laura Corvo:** Yeah, I think that's right. You've got to make sure that the job description matches what the employees are actually doing.

**Victoria Fuller:** I know we’ve said this, I think every single episode: document, document, document. [Do this] particularly when it comes to the interactive [00:55:00] process. A lot of this is done verbally, so we want to make sure we're creating a record of what the employee requested, what we did, what we offered.

If we come to a resolution, make a record of that. If you're not able to come to a resolution, it's important to have it written down what was offered. What happened to show that you did go through the process, that you tried to reach agreement as to what would be a reasonable accommodation? This is such a fact intensive issue, if it goes to suit, so you want to make sure that you have that as evidence going forward.

**Laura Corvo:** Yeah and when in doubt, consult counsel, consult your HR professionals. Don't try to go at this alone. As Chris said, sometimes these things may cost you $500 to give a reasonable accommodation but $500,000 to defend a lawsuit. When you weigh that risk, sometimes the early stuff you do when nipping the stuff in the bud is much more cost effective than having to deal with these very [00:56:00] expensive claims, as Chris explained.

**Victoria Fuller:** I'll give an example from a matter that I had several years ago. There was an employee who was out on leave and the employer-- again, small company, no dedicated HR professional--when somebody in the company saw on Facebook that this employee was on vacation, the employer assumed that the employee was abusing their leave and fired them. [It] turns out because they were on leave for a mental health condition, and the doctor had recommended that the employee take a vacation to help with the mental health condition, they were actually doing what was recommended by their doctor. If the employer had followed up with the employee before terminating, the employer would've gotten that information.

Again, follow the process. Don't assume that you know what the answer is. If there's any question about it, it's much cheaper to call your counsel, get them involved and have that conversation than to end up making a poor choice and end up getting [00:57:00] sued.

 I also just want to mention we've been talking a lot about small and mid-size employers. One thing that I've heard repeatedly in my practice, and I'm sure, Laura, you've heard the same, is you get small employers and they say, “Well, we're too small to be sued. We're never going to get sued. I don't have that many employees. This is not a big deal.” When we're talking about disability claims, this can be a bet the company type of claim. These cases go on. As Chris said, they involve experts [and] they get expensive very, very fast. No company, really, is too small here.

You should have sufficient EPL coverage. Your deductible should be something that you can self-insure. Your limit should be something that provides adequate protection for your business so that if you get sued, you can make sure that you have a limit that's going to cover you in that claim and that you're not going to end up with uninsured exposure on the backend.

**Chris Brooks:** Yeah. To add to [00:58:00] that, if you have EPL insurance in place, it's very important to report the claim right away rather than try to resolve it on your own.

**Victoria Fuller:** That's a great point.

**Laura Corvo:** With that, I think that we are out of time. Chris, we want to thank you so much for joining us for this really interesting topic and for bringing the underwriter's perspective to the podcast.

**Chris Brooks:** Thank you so much for having me.

**Victoria Fuller:** Yeah, Chris, thank you so much. Truly appreciate your thoughts and your insight on this topic. Thank you to all of our listeners for joining us here on The Employment Law Counselor Podcast, where we try to make sense of the ever-changing world of labor and employment law.

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Until next time, stay safe

**Chris Brooks:** and stay compliant.

**PLUS Staff:** Thank you for listening to this episode [00:59:00] of The Employment Law Counselor. If you haven't checked out the previous episodes, make sure to give those a listen and check back in in the next few weeks for the next episode. If you have an idea for a future PLUS Podcast, you can visit the PLUS website and complete the content idea form.