C. The North Carolina Persons With Disabilities Protection Act

North Carolina has its own statute that prevents workplace discrimination against individuals with physical or mental impairments - the North Carolina Persons with Disabilities Protection Act ("the Act"), N. C. Gen. Stat. § 168A - et seq., which is quite similar to but much shorter than the ADA. The Act defines "handicapped person" in virtually the same language as the ADA defines "disability." This definition includes "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment."

As a general rule, compliance with the ADA will satisfy all compliance issues with the Act. Few cases have been decided under the state statute, and no reported opinions show that an individual has successfully prevailed at trial.

The Act does not allow a trial by jury, and damages are limited to a maximum of two years back pay, orders to hire or reinstate the individual, attorneys' fees, and other declaratory or injunctive relief.

D. The Family Medical Leave Act

The Family Medical Leave Act of 1993 ("FMLA") provides eligible employees with guaranteed unpaid medical leave of up to 12 weeks a year for personal and family illnesses. Its most significant provision for workers' compensation purposes is that it protects employees from being terminated or otherwise suffering a negative employment action while on protected leave.

The primary manner in which the FMLA affects workers' compensation is by requiring job restoration upon an employee's return from a qualified leave of

absence. Most workers' compensation injuries that require continuing medical treatment or being placed under a doctor's continuing care will qualify for FMLA leave. Employers have an affirmative duty to categorize a qualified absence from work as FMLA leave, and this determination must be made at or near the onset of the leave. Since the FMLA protects the jobs of employees on qualified leaves, those jobs or substantially equivalent jobs must be provided to the employees upon their return to work.

It should also be noted that employees on FMLA leave cannot be required to return to work on light-duty assignments, unlike such requirements under workers' compensation laws. This can create interesting tensions when an employee who is on a leave of absence due to a workers' compensation injury also qualifies for FMLA leave.

The FMLA also contains an anti-retaliation provision. The FMLA provides that it is unlawful for an employer to interfere with, deny or restrain the attempt to exercise rights provided by the FMLA. 29 U. S.C. § 2615(a)(1). For example, it is unlawful for an employer to use an employee's taking FMLA leave as a negative factor in an employment decision. In addition, FMLA leave cannot be counted under "no fault" attendance policies. The Act also provides that it is unlawful to discriminate against any individual for opposing any unlawful practice under the FMLA. 29 U.S.C. § 2615(c)(2). Finally, the FMLA provides that it is unlawful to discharge or discriminate against any individual because the individual filed any charge or instituted any proceedings under the FMLA, has given or is about to give

information in relation to the rights under the Act or has testified or is about to testify about same.

1. Elements of a claim

To establish a claim of retaliation under the FMLA, the plaintiff must show:

(1) she availed herself of a protected right under the FMLA, (2) she was adversely affected by an employment decision; and (3) that a causal connection exists between the two. Once the plaintiff makes a showing of these elements, the burdens of proof and persuasion proceed in the same manner as an ADA retaliation claim.

2. Illustrative Case Law

Employees alleging retaliation under the FMLA must be able to show that they are protected by the FMLA and that there is a causal connection between the assertion of FMLA rights and an adverse employment action. In <u>Clay v. City of Chicago</u>, the plaintiff served as the Human Resources Director for the Department of Health. After taking a leave of absence for treatment of a health condition, the plaintiff, upon her return to work, was told that there had been several complaints regarding her performance and that she should look for employment elsewhere. The court held that the plaintiff's termination for poor performance shortly after returning from FMLA leave, and after receiving an unsatisfactory performance evaluation prior to taking leave, did not demonstrate retaliation as the plaintiff offered no evidence that her poor performance was not the true reason for her termination.

3. Remedies

Remedies available under the FMLA include back pay and benefits, interest, attorneys' fees and equitable relief such as reinstatement when appropriate. Courts also have discretion to award liquidated damages in an amount equal to the sum of damages awarded and interest on those amounts.

IV. STRATEGIES FOR PREVENTING CLAIMS

Regardless of the employment law at issue, managers and supervisors are encouraged to follow a three-step process in hiring and managing workers in today's litigious environment:

- Recognize Know the "red flags" of when a situation involves or potentially involves an employment-related law.
- Notify Assessing a "red flag" in any given situation often requires
 different degrees of knowledge concerning employment-related laws.

 Therefore, the human resources department or other appropriate
 level of management should be notified before certain employment
 actions are taken. In addition, legal counsel should be sought if there
 is any question concerning the appropriate response to a situation.
- Respond Always take action in an employment situation, even if the "action" is a decision to do nothing. The key is making an informed response to properly manage your workforce, to lessen your risk of legal liability, and to improve your chance of prevailing if the action is challenged in court.

In order to avoid suits under REDA, the ADA, the FMLA and other applicable laws, an employer must keep in mind what the laws are designed to prohibit, i.e., discrimination in the performance, modification, and termination of employment and in the enjoyment of all benefits, privileges, terms and conditions of employment. Given this prohibition, an employer should be careful in the following situations:

- Referencing work related injuries in an employee's post-injury performance evaluation;
- Disciplining an employee for reasons related to a work-place accident;
- Reducing hours/pay or reassigning to dead-end job following work-related accident;
- Termination following work-related accident.

One of the best ways to control litigation related to workers' compensation claims is to take a proactive approach from the beginning of the employment process

C. Pre-Hire Practices

- Use pre-employment drug screening after an offer of employment is made.
- Know what you can and cannot ask under the ADA about physical abilities, health conditions and medical histories - and ask what's permitted.
- Include in your written application for employment a detailed work history to be completed by the job applicant.

- Check job references.

D. Workplace Practices

- Effectively implement and manage a substance abuse policy that tests employees for illegal drug and alcohol usage.
- Implement a proactive loss prevention program that makes safety education and training a continual fixture in the workplace.
- Consider hiring someone specifically for this purpose.
- Provide initial safety orientation sessions for all employees, including temporary help.
- Consider allowing a professional to conduct ergonomic studies of your workplace to pinpoint problem areas which might lead to development of injuries among your workforce and, if at all possible, implement his or her suggestions.

Educating your employees on the basics of the system can help prevent misunderstandings which lead to litigation. Injured employees often claim they hired an attorney because they did not know what was going on with their claim.

Make sure employees understand:

- The Company, not the state, pays for workers' compensation.
- All accidents must be reported immediately by everyone.
- Employees must go to the Company doctor for care.
- Accidents will be investigated thoroughly.
- The insurance company will determine compensability.

- No benefits are paid for the first 7 days out of work.
- Weekly benefits are a fraction of normal wages.
- Light duty may be available for employees injured at work.
- Parts of the body are on a schedule.
- Fraud is a crime which the insurance company will prosecute.

Accurately documenting problems with employees is an important step in preparing for, preventing and defeating potential legal challenges. There are numerous horror stories where employers either failed to document problems with employees, documented the problems inaccurately or inconsistently, or created documents after the fact in order to recreate an apparent justification for the employment action.

An important key is to make such documentation factual and formal, and a regular part of supervisory duties. False, incomplete, inaccurate, vague, or otherwise deficient recordings can often result in more harm than good when defending employment actions.

Additional tips:

- Have policies and procedures that clearly state what is expected of employees.
- Enforce these policies and procedures in a fair, consistent manner.
 Note: If a situation arises where inconsistent enforcement is needed,
 make sure that the legitimate, nondiscriminatory reason for the inconsistency is documented.

- Give employees regular feedback on performance good and bad.
 Appraisals are a year-long process; don't let the results of an evaluation be a surprise.
- Document performance problems clearly and unambiguously when they occur. Advise the employee as to how to improve and the potential results if no improvement is shown.
- Avoid "grade inflation." Be candid and honest in performance appraisals, and overcome the reluctance to point out deficiencies.
- Make sure performance appraisals are objective rather than subjective. Give concrete samples of problems and suggestions for improvement, especially as they relate to "attitude."
- Be consistent in evaluation procedures. Use the same forms and procedures and try to evaluate consistently among employees.
- Conduct evaluations on time or be able to justify any deviations.
- Avoid "smoking gun" language in all documentation.
- Don't forget common sense.

The right and responsibility to discipline employees is indispensable to every business for maintaining order and efficiency. However, if improperly applied, disciplinary actions can create enormous liabilities for employers. To help avoid these problems:

Adopt legal and fair policies and procedures - and follow them.

- Provide for management flexibility and discretion in disciplinary policies and procedures, but be careful how you exercise both.
- Make sure that the company's expectations and requirements
 concerning job performance and conduct are clearly communicated,
 as well as the company's disciplinary consequences for failure to
 abide by these expectations and requirements.
- Make sure that employees know the penalties for excessive absenteeism or violation of other established work rules.
- Train your managers and supervisors in how to enforce these policies, procedures and requirements in a fair, professional manner.
- Properly investigate the facts of a situation before imposing discipline.
- Document all disciplinary actions. Create a paper trail in case of future litigation.
- Make sure that company policy, documentation, evaluations and past-practice support the action.
- Maintain confidentiality to help avoid defamation claims. In general,
 confidential information should be shared only with those members
 of management who have a legitimate "need to know."
- Be as considerate and professional as possible.
- Be consistent; similar infractions should result in similar disciplinary
 steps. Inconsistent treatment not only causes resentment and poor

morale among employees, it is often the primary basis for discrimination and retaliation claims.

Discharge is the final step in the disciplinary process. The actual process of termination is one of the most critical points in preventing complaints of discrimination, retaliation or wrongful discharge. While the same considerations applicable to discipline apply with even more force here, the following steps can also help reduce the ill-feelings, which often accompany termination decisions and thereby minimize employee challenges to their discharge:

- Have and rely upon *legitimate nondiscriminatory* reasons for dismissing an employee; the employee's work related injury, request for accommodation, participation in any manner in the workers' compensation process, or any other protected activity or characteristic must play no role in the decision to dismiss.
- Consult the personnel or human resources department before carrying out dismissals.
- As a general rule, conduct exit interviews with terminated employees,
 and prepare an accurate written account of the termination and exit interview.
- Try to terminate an employee in a neutral location away from co-workers, such as in the personnel office. This helps to eliminate the stigma which is usually attached to a supervisor's office.
- Always try have two people present, and notify security if a potential for violence exists.

- Present the employee with a written termination notice that states the primary reason(s) for the discharge.
- Do not argue with the employee and regardless of the employee's response, remain calm, professional and in control of the conversation.
- Make sure that you have applied rules and policies consistently and accurately. Review your discipline files to make sure that this termination is similar to your past practices.
- Try to distribute all final paychecks and COBRA forms at the time of termination to avoid having the employee return to company property at a later time.
- Escort the discharged employee to collect any personal belongings,
 and off company property.

