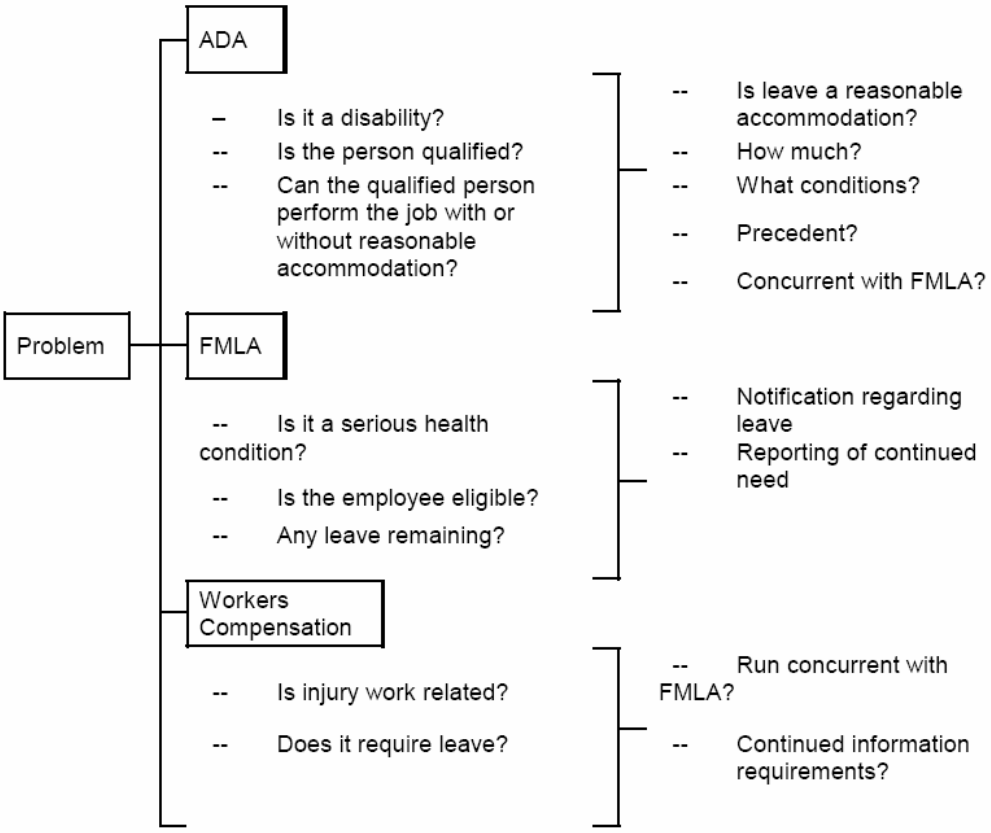
AT THE INTERSECTION OF THE FMLA, ADA AND WORKER'S COMPENSATION

By: Kelly R. Baier
Bradley & Riley PC
2007 First Avenue S.E.
Cedar Rapids, IA 52402
Telephone: 319-363-0101

INTERACTION OF FMLA, ADA AND WORKERS COMPENSATION

	FMLA	ADA	Workers Compensation
Light Duty	Cannot require	May be reasonable accommodation but can you end it? Do you set a dangerous precedent?	Saves money, insurance loves it and it encourages a quicker return to work.
Info	Can require certification	Discouraged - but permitted. View it as a way to determine accommodation.	Can require. In fact, doctor typically selected by employer.
Leave	Up to 12 weeks unpaid per year. Can be intermittent.	May be part of a reasonable accommodation. Intermittent may not be reasonable.	See Light Duty.


Problem
ADA
– Is it a disability?
-- Is the person qualified?
-- Can the qualified person perform the job with or without reasonable accommodation?
-- Is leave a reasonable accommodation?
-- How much?
-- What conditions?
-- Precedent?
-- Concurrent with FMLA?
FMLA
-- Is it a serious health condition?
-- Is the employee eligible?
-- Any leave remaining?
-- Notification regarding leave
-- Reporting of continued need
Workers Compensation
-- Is injury work related?
-- Does it require leave?
-- Run concurrent with FMLA?
-- Continued information requirements?

I. INTRODUCTION

The FMLA, ADA, and Iowa Code Chapter 85 (the Workers Compensation Law) are relatively short statutes. The statutes are ambiguous, primarily as the result of significant compromises as part of the legislative process. The statutes were drafted by different legislative bodies, at different times and for different reasons. Because the statutes are short and very broadly worded, significant administrative regulations have been promulgated in an attempt to define more precisely the meaning of the statutes. In addition, the statutes are the subject of significant case law. All of this results in an extremely uncertain and difficult analysis of the application of the statutes to situations involving employee disciplinary action. The analysis is further complicated when a work related injury is a factor and the employee is seeking or receiving worker's compensation benefits.

II. OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

One of Congress's purposes in enacting the ADA involved eliminating the discrimination qualified individuals with disabilities face in their day-to-day lives. 42 U.S.C. § 12101.

WHAT IS DISCRIMINATION:

1. Limiting, segregating or classifying applicants or employees in a way that adversely affects opportunities or status because of disability.

2. Contracting with employment agencies or training apprenticeships organizations to discriminate for the employer.

3. Excluding or otherwise treating differently because of a relationship with an individual with a disability.

4. Denying employment because hiring disabled person would force employer to make reasonable accommodation.

5. Using standards, criteria, or administrative methods that have the effect of discriminating or perpetuating discrimination.

6. Employment test and qualifying standards or criteria that tend to screen out disabled persons unless test or standard is job-related and consistent with business necessity.

7. Failing to test in the most effective manner and assuring that tests measure what they purport to measure rather than reflecting a disability.

8. Failure to make reasonable accommodations without a showing that to do so would work an undue hardship.

WHAT IS A DISABILITY:

1. A physical or mental impairment that substantially limits one or more of the major life activities;

2. A record of such impairment; or

3. Being regarded as having such an impairment.
What are the major life activities:

-- caring for oneself
-- performing manual tasks
-- walking
-- seeing
-- hearing
-- speaking
-- breathing
-- learning
-- working
-- participating in community activities.

4. The term "substantially limits" means:

(i) unable to perform a major life activity that the average person in the general population can perform; or

(ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. Section 1630.2(j)(i)-(ii).

5. With respect to the major life activity of "working", the term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. However, the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. Section 1630.2(j)(3)(i).

Disability does not include:

1. Employee or applicant currently engaged in the use of illegal drugs.

   Does include, however, persons who have been successfully rehabilitated or are participating in a supervisory rehabilitation program, or is erroneously regarded as engaged in such use.

2. Homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gambling, kleptomania, pyromania.

WHO IS A QUALIFIED INDIVIDUAL WITH A DISABILITY:

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

WHAT ARE THE ESSENTIAL FUNCTIONS OF A JOB:
Fundamental job duties intrinsic to employment position, not the "marginal functions" of the job.

A job function may be considered essential because:

(a) the reason the position exists is to perform that function;
(b) of the limited number of employees available among whom the performance of that job function can be distributed; or
(c) the function is highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform that function.

Evidence of whether a particular function is essential includes:

(a) employer’s judgment;
(b) written job descriptions prepared before advertising or interviewing applicants;

(c) amount of time the function involves;
(d) consequences of not requiring the incumbent to perform the function;
(e) terms of a collective bargaining agreement;
(f) work experience of past incumbents;
(g) current work experience of incumbents in similar jobs.

Regular and reliable attendance is a necessary element of most jobs. Spangler v. Federal Home Loan Bank, 278 F.3d 847, 850 (8th Cir. 2002).

WHAT IS REASONABLE ACCOMMODATION:

Making existing facilities readily accessible to and useable by disabled individuals. May also include:

-- job restructuring
-- part-time or modified work schedules
-- reassignment to a vacant position (no requirement to bump other employees)
-- acquisition or modification of equipment or devices
-- appropriate adjustments or modifications of examinations, training materials, or policies
-- the provision of qualified readers or interprets and other similar accommodations for individuals with disabilities.

Reasonable accommodation also includes modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position. 29 C.F.R. Section 1630.2(o)(ii).

However, an employer is under no obligation to reallocate the essential functions of a position that a qualified individual must perform. Spangler, 278 F.3d at 850; Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675, 681-82 (8th Cir. 2001).

WHAT ABOUT MEDICAL EXAMS AND INQUIRIES INTO PAST MEDICAL TREATMENT:

1. Pre-Offer. An employer may not conduct a medical examination or make inquiries (either on application form or during interview) of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability. This includes questions about: (a) general health; (b) past medical history; and (c) workers compensation.

2. Post Offer. An employer may require a medical examination after an offer of

employment has been made, and may condition an offer of employment on the results of the examination if: (a) all employees entering that job are subjected to such an examination; (b) the medical information is placed in a separate, confidential medical file; and (c) the results of such examination are used only as allowed by the ADA.

WHAT IS AN UNDUE HARDSHIP:

An action requiring significant difficulty or expense, when considered in light of the following facts:

-- nature and cost of accommodation
-- financial resources of covered facility
-- number of employees
-- effect on expenses and resources
-- impact on operations
-- type of operation, including composition structure and functions of work force

WHAT IS A PRIMA FACIE CASE OF DISABILITY DISCRIMINATION:

To establish a prima facie case of disability discrimination, the plaintiff must show that (1) his condition qualifies as a disability under the ADA; (2) he is qualified to perform the essential functions of his position with or without reasonable accommodation; and (3) he has suffered adverse employment action because of his disability.

III. FAMILY AND MEDICAL LEAVE ACT

A. INTRODUCTION

1. Family and Medical Leave Act of 1993 (FMLA) became effective on August 5, 1993.

2. The FMLA requires private sector employers of 50 or more employees and public agencies to provide up to 12 weeks of unpaid, job protected leave to eligible employees for certain family and medical reasons. Employees are eligible if they have worked for a covered employer for at least one year and for 1,250 hours over the previous 12 months and if there are at least 50 employees within 75 miles.

3. The FMLA was created in part because of inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods. 29 U.S.C. § 2601(a)(4).

B. REASONS FOR TAKING LEAVE

1. An employer must grant unpaid leave to an eligible employee for one or more of the following reasons:

a. For the care of the employee's child (birth or placement for adoption or foster care);

b. For the care of the employee's spouse, child or parent, who has a serious health condition; or

c. For a serious health condition that makes the employee unable to perform his or her job.

2. Certain kinds of paid leave may be substituted for unpaid leave under the FMLA.

C. ADVANCE NOTICE AND MEDICAL CERTIFICATION

1. The employee may be required to provide advance leave notice and medical certification.

a. The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."

b. An employer may require medical certification to support a request for leave because of a serious health condition.

c. An employer may also require medical certification if the employee is unable to return from leave because of a serious health condition.

D. INTERMITTENT OR REDUCED LEAVE

1. An employee may take intermittent leave or may work a reduced leave schedule to reduce the usual number of hours per day or work week.

2. Intermittent or reduced leave schedules are subject to employer approval unless medically necessary.

E. JOB AND BENEFITS PROTECTION

1. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay benefits and other employment terms. Employers may deny restoration to certain highly compensated employees, but only if necessary to avoid substantial and grievous economic injury to the employer's operation.

2. If, after FMLA leave ends, the employee is unable to perform an essential function of the position because of a physical or mental condition, the employee has no right to restoration to another position under the FMLA. Reynolds v. Phillips & Temro Indus. Inc., 195 F.3d 411, 414 (8th Cir. 1999).

3. The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

4. The use of unpaid FMLA leave cannot affect the exempt status of bona fide executive, administrative and professional employees under the Fair Labor Standards Act.

F. MEDICAL INSURANCE COVERAGE

1. For the duration of FMLA leave, the employer must maintain the employee's medical insurance coverage under any "group health plan" under the conditions coverage would have been provided if the employee had continued working.

2. In some cases, the employer may recover premiums paid for maintaining an employee's health coverage if the employee fails to return to work from FMLA leave.

G. UNLAWFUL ACTS BY EMPLOYERS

1. Interference with restraint or denying the exercise of any right provided under FMLA.

2. Discharge or discrimination against any person for opposing any practice made unlawful by the FMLA.

3. Discharge or discrimination against any person because of involvement in any proceeding under or related to the FMLA.

H. MISCELLANEOUS PROVISIONS

1. Special rules apply to employees of local education agencies.

2. Employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA. Any employer who willfully violates this requirement maybe subject to a fine of up to $100 for each separate offense.

I. THE FMLA DOES NOT

1. Affect any federal or state law prohibiting discrimination.

2. Supersede any state or local law which provides greater family or medical leave rights.

3. Diminish an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan, nor may the rights provided under FMLA be diminished by such agreement or plan.

4. Discourage employers from adopting policies more generous than

required by FMLA.

J. ENFORCEMENT

1. The Secretary of Labor is authorized to investigate and attempt to resolve complaints of violations, and may bring an action against an employer in any federal or state court of law.

2. The enforcement procedures of the FMLA parallel those of the federal Fair Labor Standards Act. The FMLA will be enforced by the Department's wage and hour division.

3. An eligible employee may bring a civil action against an employer for violations.

4. Employers who act in good faith and have reasonable grounds to believe their actions did not violate FMLA may have any damages reduced to actual damages at the discretion of the judge.

IV. IOWA WORKERS COMPENSATION

A. The Iowa Workers Compensation Law is a statutory system for benefits for work related injuries. The goal of the law is to compensate an employee.

An employee who has an injury arising out of and in the course of employment is compensated as follows:

1. All necessary reasonable medical expenses causally connected to the injury.

2. Temporary total/healing period benefits. Weekly benefits (approximately 80% of take home pay) until the worker returns to work, reaches maximum medical improvement, or is capable of returning to substantially similar work.

3. Permanency benefits. Weekly benefits for permanent disability.

   a. Scheduled member injuries (hands, arms, feet, legs, eyes).

   b. Unscheduled injuries (back, shoulder, neck, also known as body-as-a-whole injuries or industrial disability benefits).

V. ABSENCES UNDER THE ADA AND FMLA

A. INTRODUCTION

Work attendance continues to be a major concern of employers. Some employers have adopted "no fault" attendance policies where a certain number of absences in a given period of time, regardless of the reason for the absences, will result in disciplinary action. Other employers have adopted "occurrence" systems where accumulating a certain number of points or occurrences for absences during a period of time can lead to

disciplinary action. At issue is whether an employer can take disciplinary action with respect to an employee for absenteeism problems, without violating the ADA or the FMLA.

B. Requirements of the ADA and the FMLA relating to absences.

1. The FMLA expressly states:

> Nothing in this Act or any amendment made by this Act shall be construed to modify or effect any Federal or State law prohibiting discrimination on the basis of... disability.
>
> 29 U.S.C. Section 2651(a).

2. The legislative history of the FMLA distinguishes the purposes of the FMLA from the purposes of the ADA:

> The FMLA is "not intended to modify or to affect ... the Americans With Disabilities Act of 1990, or the regulations issued under that Act. Thus, the Leave provisions of the Family and Medical Leave Act are wholly distinct from reasonable accommodation obligations of employers covered under the Americans With Disabilities Act.... The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protections. Cehrs v. Northeast Ohio Alzheimer Research Center, 959 F.Supp. 441, 449, note 8 (N.D. Ohio 1997).

3. One court has explained the distinction between the ADA and the FMLA as follows:

> The ADA is a nondiscrimination statute and thus focuses on leveling the playing field for disabled individuals to allow them to compete with nondisabled employees (hence the requirement of "reasonable accommodation"). Job presence being an essential job function for all employees, disabled employees must be able to fulfill that requirement.
>
> The FMLA was designed to entitle employees to take reasonable leave for medical reasons .... Thus, its specific purpose was to deal with situations such as the one presented here -- no medical leave policy to cover absences due to sickness and the possibility of an employee being terminated based upon the accumulation of too many "occurrences."
>
> George v. Associated Stationers, 932 F.Supp. 1012 (N.D. Ohio 1996); see Spangler, 278 F.3d at 851.

C. ABSENTEEISM AND THE ADA

The ADA "is not a job insurance policy, but rather a Congressional scheme for correcting illegitimate inequities the disabled face." Valentine v. American Home Shield Corp., 939 F.Supp. 1376 (N.D. Iowa 1996). Accordingly, management can discipline disabled individuals for legitimate business reasons. For instance, when a disabled employee is not performing adequately, management may take appropriate disciplinary action.

In almost all employment, regular predictable attendance is an essential function of a job. Spangler, 278 F.3d at 851; Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996).

The question typically presented is whether a disabled employee's absenteeism is excessive so as to justify disciplinary action or, should the employer "reasonably accommodate" the employee and provide greater flexibility in attendance. Because regular, reliable and predictable attendance is an essential function of most jobs, modification of attendance requirements most likely will not be a reasonable accommodation. A "work when able" schedule is not a reasonable accommodation. Kennedy v. Applause, 90 F.3d 1477 (9th Cir. 1996).

Unpaid leave can be used to accommodate an employee's treatment or recovery as long as the amount taken does not cause the employer an undue hardship. See Smith v. Blue Cross Blue Shield of Kansas, 102 F.3d 1075 (10th Cir. 1996), cert. denied 522 U.S. 811 (1997).

SUGGESTIONS

1. Action. Earlier action rather than later action. Deal with the attendance problem when it first becomes evident. These problems very seldom get better with time.

2. Documentation. Don't just build a file on the employee. Use your documentation as a management tool. Provide the employee in question with your documentation so that they know precisely where they stand.

3. Consistency. If nondisabled employees have been cut slack on attendance, you should cut slack for the disabled employee.

D. ABSENTEEISM AND THE FMLA

Every covered employer should review its absentee policy for compliance with the FMLA. If there is an attendance policy that can be characterized as a no fault policy, where all absences are counted, the policy needs to be rewritten. See 29 C.F.R. Section 825.220(c). In addition, the paper work associated with attendance needs to have some mechanism to indicate that absences for FMLA reasons are not counted. It is important for the employer to be able to visually show a Department of Labor representative that those days were not counted in the calculation for an excessive absenteeism determination.

An employer's termination of an employee for excessive absenteeism during his or her FMLA leave may violate the Act. See Vierbeck v. City of Gloucester, 961 F.Supp. 703, 708 (D.N.J. 1997); 29 U.S.C. Section 2615(a)(1) (it shall be unlawful for an employer to interfere with, restrain, or deny the exercise of ... any right provided under this subchapter").

The statute and administrative regulations make it clear that an employer may not consider FMLA leave in an adverse way against an employee who takes such leave, either in the administration of discipline or the company's attendance policy. 29 U.S.C. Section 2652(b) ("the rights established under [FMLA] ... shall not be diminished by an collective bargaining agreement or any employment benefit program or plan."). An employer cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA be counted under "no fault attendance policies." 29 C.F.R. Section 825.220(c); see Darby v. Bratch, 287 F.3d 673, 680 (8th Cir. 2002).

VI. INTERACTION OF THE FMLA AND THE ADA

A. Leave Policies:

1. The FMLA provides up to 12 weeks of unpaid leave per employee per year.

2. The ADA provides for unpaid leave to be granted if "reasonable." No specific maximum or minimum length of leave is required.

3. Interaction. The employer must give 12 weeks if needed; must give additional weeks if reasonable.

B. Medical Information:

1. Under the FMLA, the employer is entitled to medical certification of condition. No requirements regarding confidentiality.

2. Under the ADA, information on employee's general medical condition cannot be gathered. All medical information obtained must be kept confidential from other employees in the company. Information probably can be obtained as part of a reasonable accommodation.

3. Interaction. The employer is entitled to FMLA certification information. However, such information should be kept confidential.

C. Return to New Position If Previous Position Filled.

1. Under the FMLA, the employer must reassign the person to a new position and pay previous rate of pay.

2. Under the ADA, the employer must consider reassignment and

reassign the employee to a new position if reasonable.

3. Interaction. In most cases, consider reassignment at the same rate of pay.

D. Eligible Employees.

1. Under the FMLA, employees are covered if they have a year or more of service and have worked more than 1,250 hours that year.

2. Under the ADA, qualified employees and applicants with a disability.

E. Covered Employers.

1. Under the FMLA, 50 or more employees.

2. Under the ADA, 15 or more employees.

F. Condition.

1. Serious health condition requiring ongoing in-patient or out-patient treatment by a health care provider.

2. Under the ADA, an individual who has or had a physical or mental impairment that significantly limits a major life activity; anyone perceived with such a condition.

VII. INTERACTION OF THE ADA AND WORKERS COMPENSATION

A. Injury. An injury under workers compensation might also be a disability under the ADA.

B. Reasonable Accommodation. The ADA obligation of reasonable accommodation will interact with the return to work of an injured employee.

1. Light Duty. Under workers compensation, the emphasis is to get the employee back to work as soon as possible.

a. Reduces workers compensation benefits.

b. Employer typically gets fully recovered more quickly.

c. Workers compensation insurance carrier emphasize this approach.

2. ADA. Light duty may be more than a reasonable accommodation.

a. Light duty may be a newly created position.

b. Light duty may be a change in essential functions of the job.

C. Information to be Obtained.

1. Workers Compensation. Typically, the employer receives a great deal of information. In fact, the employer usually picks the doctor who is treating the employee.

2. ADA. Obtaining medical information regarding the employee's condition is discouraged by the law. And once you receive such information, you must be careful on its use. Its use could result in a perceived disability claim.

VIII. INTERACTION BETWEEN THE FMLA AND WORKERS COMPENSATION

A. Leave.

1. FMLA - 12 weeks unpaid.

2. Workers Compensation - indefinite.
3. They key is to run leave under workers compensation concurrently with FMLA leave.

B. Light Duty.

1. Workers Compensation. This is a favorite approach.

2. FMLA. The employer cannot require an employee to give up leave for light duty. The employee can refuse light duty. 29 C.F.R. 825.207(d)(2).

3. Refusal of light duty may cut off the workers compensation claims.

IX. DRUG OR ALCOHOL ABUSE

A. Drug use and the ADA.

1. Current drug use is not protected.
Individuals who are "currently engaging" in the illegal use of drugs are not protected under the ADA. Such an individual will not be considered an "individual with a disability" or a "qualified" individual with a disability. 42 U.S.C. Section 12210(a) and 12114(a). A test to determine the illegal use of drugs shall not be considered a medical examination under the ADA. 42 U.S.C. Section 12114(d)(1).

The term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the language is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. Baustian v. State of Louisiana, 910 F.Supp. 274 (E.D. La. 1996)

(being drug free for seven weeks is not enough time to be classified as a recovered drug user).

B. Recovering drug addicts may be protected.

The term "individual with a disability" and "qualified individual with a disability" includes individuals who:

1. have successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

2. is participating in a supervised rehabilitation program and is no longer engaging in such use; or

3. is erroneously regarded as engaging in such use, but is not engaging in such use. 42 U.S.C. Section 12114(b) and 12210(b).

C. Alcoholics and the ADA.

An alcoholic is a person with a disability under the ADA and is entitled to consideration of a reasonable accommodation, if the person is qualified to perform the essential functions of a job. An employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance in the same manner as the employer would discipline a nonalcoholic individual. The ADA provides that an employer may hold an alcoholic employee to the same performance and behavior standards to which the employer holds other employees "even if any unsatisfactory performance is related to the alcoholism of such employee." 42 U.S.C. Section 12114(c)(4).

D. Treatment of "Substance Abuse"
Under the FMLA. FMLA leave is available for treatment of "substance abuse." 29 C.F.R. Section 825.112(g).

1. FMLA leave is available for treatment for substance abuse provided that the substance abuse meets the definition of "serious health condition."

2. An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

3. FMLA leave may only be taken for treatment by a health care provider or by a provider of health care services on referral by a health care provider. It is the treatment for substance abuse that qualifies an individual for FMLA leave. See 29 C.F.R. Section 825.114(d).

4. Drug testing. Drug tests are not prohibited by the ADA or FMLA. However, Iowa law greatly restrains drug testing of employees.