

**ADA, FMLA & WC:  
NAVIGATING THE  
BERMUDA TRIANGLE &  
COMING OUT ALIVE**

# YOUR PRESENTERS:

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# INTRODUCTION

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When it comes to navigating the “Bermuda Triangle” of employment laws, the intersection between the Americans with Disabilities Act (ADA), the Family & Medical Leave Act (FMLA) and Worker’s Compensation (WC) can be confusing and challenging because some (or all) of these laws may intersect at some point.

This presentation will help guide you through this thicket of laws and provide tips for how to handle real-world situations where the laws overlap and/or conflict.



**DISCLAIMER:**

The content of this presentation is for information purposes only. If you need legal advice on issues discussed today, you should contact your employment lawyer.

# Why Do We Care?

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The majority of scheduled & unscheduled absences are covered by one (or more) of these laws.

When it comes to navigating the “Bermuda Triangle” of employment laws, the intersection between the Americans with Disabilities Act (ADA), the Family & Medical Leave Act (FMLA) and Worker’s Compensation (WC) can be confusing and challenging because some (or all) of these laws may intersect at some point.

Essential for businesses to understand the interplay between these laws to ensure legal compliance.



# **LET'S START WITH THE BASICS—THE LAWS**

## **ADA**

Provides access to work; prohibits discrimination for those who are qualified individuals with a disability; requires reasonable accommodation

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## **FMLA**

Provide eligible employees with the right to take time off of work and protect the employee's job

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## **WC**

No-fault law which provides for the payment of compensation, medical expenses and rehabilitation for workplace injuries, accidents or health conditions, plus weekly comp, retraining or a lump-sum payment

# AMERICANS WITH DISABILITIES ACT/WFEA

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- ❖ Protection for applicants and employees
- ❖ 15 or more employees for 20 weeks during current or preceding year, including state & local governments
- ❖ Under Wisconsin law, 1 or more employees
- ❖ Must have a “disability” – physical or mental impairment which substantially limits 1 or more major life activities
- ❖ Leave can be a reasonable accommodation; no need to create a position – no undue hardship
- ❖ Enforced by EEOC and DWD (300 days/90 days)

# FAMILY & MEDICAL LEAVE ACT

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- ❖ Protection for employees
- ❖ 50+ employees (w/in 75-mile radius) for 20 or more weeks during current or preceding year (no radius for WFMLA)
- ❖ 1,250 hours in preceding 12 months (1,000 hours in 52 consecutive weeks for WFMLA)
- ❖ Serious health condition affecting employee or specified family member
- ❖ 12 weeks/2 weeks of leave
- ❖ Return employee to same job or substantially equivalent job
- ❖ Enforced by DOL (2 yrs) and DWD (30 days)



# WORKER'S COMPENSATION

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- ❖ Protection for all employees of employers > 3 employees
- ❖ Requirements:
  - ❖ Employer-employee relationship
  - ❖ Accident/illness/injury must arise in the course and scope of employment
  - ❖ Limited exceptions for self-inflicted injuries, willful disregard of safety rules or intoxication from alcohol or illegal drugs
- ❖ Unlimited leave during recovery of work-related injury
- ❖ Some employers "create" light duty to accommodate early RTW
- ❖ Enforced by DWD (30 days / 2 years / 12 years)

# HOW DO THE LAWS INTERSECT?

# TRIGGERING EVENTS

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## **ADA**

Need adjustment or change to job for a medical condition.

Reasonable accommodation – interactive process.

## **FMLA**

Employee must provide verbal notice to make employer aware of need for qualifying leave.

Constructive notice may trigger employer obligations.

## **WORKER'S COMP**

Employer knowledge of OTJ injury or notice within 30 days.

# DOCUMENTATION REQUIREMENTS

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## **ADA**

Employer may request medical certification RE nature, severity & duration of condition

Can employee perform job with or without reasonable accommodation

## **FMLA**

DOL Certifications generally control

Employer may request 2<sup>nd</sup> or 3<sup>rd</sup> medical opinion

## **WORKER'S COMP**

Generally handled through WC adjuster



*"I know this sounds kooky, but what if we  
communicated with the employee?"*



# REINSTATEMENT PROTOCOL

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## **ADA**

Same job unless holding job open creates undue hardship or employee unable to perform essential functions, with or without reasonable accommodation

## **FMLA**

Returned to same position (or an equivalent one) unless an exception applies or exceeds FMLA

## **WORKER'S COMP**

Employer must offer suitable available positions, unless good cause exists (§102.35 claims)

# Tricky ADA/FMLA/WC Issues:

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## **QUESTION:**

If an employee who suffered a work-related injury asks for time off for medical treatment, should the employer treat this as a request for FMLA too? What about STD?

## **ANSWER:**

It depends. You may need to simply treat it as an accommodation request (e.g., I need to get treatment for my knee)

If the condition qualifies as a “serious health condition,” provide FMLA paperwork.

- Construe liberally

*Query: Do your leave policies run concurrently?*

# Tricky ADA/FMLA/WC Issues:

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**QUESTION:**

An employee has requested a leave of absence because she cannot perform the essential functions of her job due to a work-related injury. Can you instead offer the employee a vacant position that will allow the employee to continue working?

**ANSWER:**

Under the ADA, yes. The employer gets to choose the accommodation—even if it is not the accommodation the employee wants. The accommodation need only be effective.

However, if the employee has FMLA available and the condition is a serious health condition, the employee is entitled to leave even if the employee could continue working with a reasonable accommodation.

Under worker's compensation, the employer can offer the employee alternative duties to reduce TTD. If employee chooses FMLA, generally not eligible for TTD.



# Tricky ADA/FMLA/WC Issues:

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**QUESTION:**

I have an employee who suffered a work-related injury. How much information can I ask for about the condition and work restrictions?

**ANSWER:**

Consider FMLA first. The medical Certification/RTW Certifications control during FMLA-protected leave.

If employee requires more leave after FMLA, then consider seeking additional information about nature of the leave.

# Tricky ADA/FMLA/WC Issues:

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## **QUESTION:**

How do I handle requests for intermittent or reduced schedule leave?

## **ANSWER:**

FMLA

- Employer can transfer employee on temporary basis to an available position with equivalent pay and benefits to accommodate intermittent leave.

ADA

- Employee can take reduced schedule leave as a reasonable accommodation so long as the leave doesn't constitute an undue hardship.
- More difficult to analyze whether part-time schedule can be made permanent.
- Can transfer to a vacant equivalent position.

# Case Study #1

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Mary works in shipping & receiving at Acme and has been employed for 13 months.

- At best, she is an average employee.
- During her tenure, she has used all of her PTO – and then some.
- Mary she claims she injured her back 6 months ago lifting a box, but never told anyone about this injury. Your records say Mary was on vacation the day she claims the injury occurred.
- Mary's doctor took her off of work for 10 weeks.
- Fast forward 10 weeks. Mary is still experiencing back pain and her doctor wants her to be on leave for another 4 weeks.
- After the additional 4 weeks of leave, her doctor extends the leave for another 4 weeks.
- Your shipping & receiving department is falling behind without Mary and you need to hire because of the upcoming busy season.

# Case Study #1 - Questions

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- Do you report Mary's injury as work-related?
- If your WC carrier denies Mary's claim, can you deny her FMLA?
- Do you grant Mary the additional 4 weeks of leave?
- Do you grant Mary the 2<sup>nd</sup> additional 4 weeks of leave?
- Should you replace Mary & what risks exist?
- What if Mary didn't have a work-related injury. Would you handle the situation differently?
- Can you offer Mary a severance package if she's unable to return to work and does your release absolve you of all claims?



## Case Study #2

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Jim has been employed as an assembler at We Assemble For You for 3 years.

- After working a long 50-hour week, Jim told his supervisor his right shoulder hurt and he thought it was related to his job and long hours.
- Jim's supervisor sent him to the company nurse at the on-site clinic.
- Jim saw no improvement after 2 weeks in the early intervention program and saw his doctor – recommended no work and 6 weeks of physical therapy.
- 6 weeks later Jim still has subjective complaints. His doctor continued him off of work and a MRI was ordered.
- After the MRI, the WC claims adjuster scheduled an IME. The IME opined Jim suffered a minor exacerbation of his pre-existing degenerative shoulder injury and that he reached a healing plateau after the 6 weeks of PT.
- The claims adjuster denied Jim's claim after receiving the IME opinion, but Jim's doctor recommended another 6 weeks of PT and for Jim to remain off of work
- As of today, Jim has missed 15 weeks of work. He received 6 weeks of TTD, retained a lawyer and his doctor is recommending surgery.

## Case Study #2 - Questions

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- As the Human Resources Manager, what steps would you be taking over the last 15+ weeks?
- What steps will you take moving forward?
- Fast forward 1 year. Jim has recovered from surgery and placed at MMI with permanent work restrictions. Jim's WC claim remains in litigation without resolution at this time. Jim's permanent restrictions prohibit him from performing essential job functions without an accommodation. What steps would you take as the employer? What about the employer's attorney?

## Case Study #3

Denise has been an Administrative Assistant at the same company for 5 years.

- Denise is rated yearly, as meeting expectations.
- Prior to office shut downs and work from home (WFM) due to the COVID pandemic, Denise exhausted FMLA for intermittent time off and provider appointments, every year.
- During shut downs, when Denise was working from home, she stopped requesting FLMA and went two years without needing to request intermittent time off.
- When return to office (RTO) is announced as mandatory, Denise immediately applies for FMLA and shares with her manager that she is having anxiety and panic attacks over the nearing RTO date. Denise also shares that she suffers from a mental health condition and that her doctor doesn't think she is ready to RTO and said that she should request to continue to WFH.

## Case Study #3 - Questions

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- The manager knows Denise has been getting her job done remotely. Should the manager tell Denise that it is not a problem for her to continue to WFH?
- Should the manager notify HR and start the ADA process for accommodations?
- Is WFH reasonable and if so, how long do you accommodate WFH?
- Should an alternative work schedule be considered?
- Fast forward to RTO – Denise is granted a limited WFH accommodation, to be reviewed in 6 months. While working through the ADA interactive process, Denise and her provider decide that working in office one day per week is agreeable and that it will help Denise work toward full RTO. Every other week Denise's HR person check's in to see how she is acclimating. Denise continues to work with her mental health provider to manager her condition. After 12 weeks of working in office 1 day per week Denise and her provider agree that 2 days per week best for Denise. Do you allow the 2 days per week?
- Fast forward to the 6-month mark – Denise is now working full-time in office and is grateful she was supported in her accommodation need. Denise uses FMLA intermittent days off when needed.



## POLICIES TO AVOID

1. Terminating an employee once they have been out of work for 1 year due to a work-related injury.
2. Refusing to accommodate temporary restrictions, requiring a full duty release to return to work or 100% healed policies.
3. Only accommodating restrictions for conceded work injuries.
4. Not running FMLA concurrently with WC benefits.

## BEST PRACTICES

1. Well-written policies describing what is expected from employees.
2. Assess each matter using the law which provides the employee the greatest protection.
3. Maintain accurate job descriptions.
4. Train your managers, HR & safety personnel.
5. Communicate.
6. Document, document, document.

# Thank You

Any questions?

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