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POMS & ASSOCIATES HR & EMPLOYMENT WEBINAR SERIES

NAVIGATING THE HR BERMUDA TRIANGLE

Tips and Traps Administration of FMLA, ADAAA, WORKERS' COMP, and MORE

Steven G. Meilleur, Ph.D., SPHR
Sr. VP Risk Services - HR & Employment
Faculty, UNM School of Public Administration
smeilleur@pomsassoc.com

6 & 7 APRIL 2023

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TODAY'S PRESENTER

Steven G. Meilleur, Ph.D., SPHR
Sr. Vice President, Risk Services - HR & Employment, and Faculty, UNM School of Public Administration
Poms & Associates Risk Services
201 3rd Street NW, Suite 1400 | Albuquerque, New Mexico 87102
(505) 933-6291 • m - (505) 401-0942 • smeilleur@pomsassoc.com

Steven G. Meilleur, Ph.D., SPHR is Sr. Vice-President of Risk Services for Poms & Associates, working with clients around the country to provide consulting, training, and other advisory services specializing in human resources and employment matters. He has more than 40 years of exempt-level experience in HR management, Risk Management, and Organizational Development in the public, private for-profit, and private non-profit sectors. Among other positions he has held Dr. Meilleur has served as the HR Director for the City of Rio Rancho, NM, Director of the State Bar of NM's Center for Legal Education, and HR Team Leader for Plains Electric G&T Cooperative.

His experience in HR management is in the public, private for-profit, and private non-profit sectors, having served in executive and other management positions. He received his BA in English Literature and Education at Bucknell University, and his EMBA & Ph.D. from the University of New Mexico. He is also a Lecturer on the faculty of the UNM Graduate School of Public Administration, teaching in the areas of human resource management, leadership, organizational behavior, strategy and change, and NPO management.

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Be sure to check all information regarding Workers' Compensation for each state where you have employees.

TODAY'S TOPICS AND AGENDA

- Bermuda Triangle of Employment Law Basics:
FMLA > ADAAA > Workers Compensation > Plus ...
- FMLA > ADAAA > Workers Compensation
Areas of Interaction & Interplay
- The Bermuda Triangle of Employment Law:
Job Restoration Features
- The Bermuda Triangle of Employment Law:
Common Questions & Issues
- Summary and Takeaways - QUESTIONS?

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BERMUDA TRIANGLE OF EMPLOYMENT LAW BASICS:
FMLA > ADAAA > WORKERS COMPENSATION > PLUS ...

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OVERLAPPING STANDARDS AND PROTECTIONS

The key to navigating the confusing waters of ADA, FMLA and WC is understanding both the fundamentals of each law on its own *and* how these laws work together.

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RECOGNIZING THE INTERPLAY OF THE ADAAA, FMLA AND WC LAWS

Employers need to recognize and analyze the interplay of these laws because:

- The majority of unscheduled and scheduled absences are related to the illness of employees or their family members. One, two or all three of these laws may be involved.
- Violations of these laws may result in lost wages, back pay, reinstatement, retroactive benefits, compensatory damages and punitive damages.
- Other than the legal responsibilities, employers have moral and ethical responsibilities to ensure that employees receive the benefits and protections these laws provide.

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PURPOSES OF THE ADAAA, THE FMLA AND WC

- The **ADAAA** prohibits discrimination against applicants and employees who are qualified individuals with a disability, have a record of disability, and those “regarded as” having a disability.
- The **FMLA** sets minimum leave standards for employees for the birth and care of a newborn child, placement of a child for adoption or foster care, care for an immediate family member with a serious health condition, an employee’s serious health condition, and to care for an injured service member.
- **Workers Comp** Laws provide income protection. While the federal Occupational Safety and Health Act (OSHA) requires employers to provide safe working conditions, it is the various state workers’ compensation laws that provide for payment of compensation and rehabilitation for workplace injuries and minimize employer liability. They may also provide retaliation and job protection.

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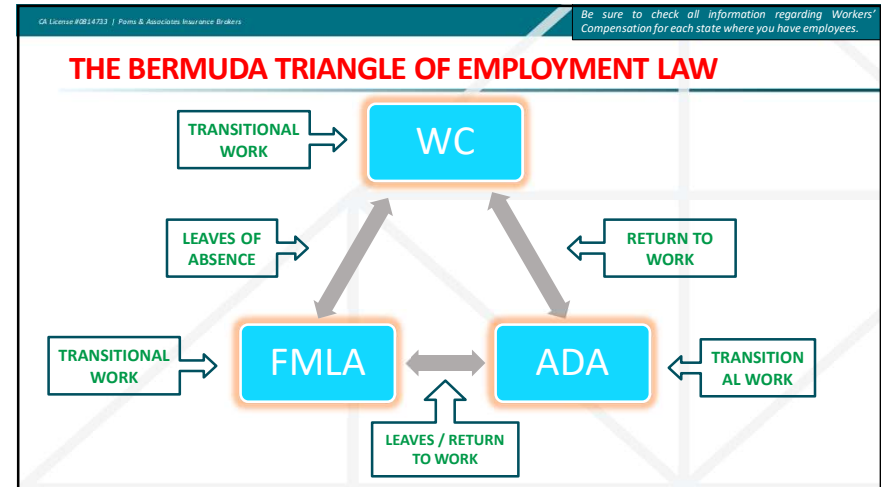
COMMON GOAL

ADAAA, FMLA and Worker's Comp Laws serve a common goal:

- To allow sick, injured or disabled employees to take time away from work without fear of losing jobs and benefits.

- ADA:** provides a right to work – "return to work"
 - Enforced by the U.S. Dept. of Labor, U.S. Equal Opportunity Commission (EEOC)
- FMLA:** provides a right not to work.
 - Enforced by the U.S. Dept. of Labor Wage & Hour Division
- Worker's Compensation:** provides compensation to those who cannot work due to workplace injury.
 - Enforced by state Workers' Compensation Laws: state workers compensation commissions

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ADAAA: Americans With Disabilities Act Amendments Act

- The Americans with Disabilities Act** prohibits discrimination against people with disabilities and guarantees that they have equal opportunities in matters of employment.
- Employers with 15 or more employees are required to comply with the ADAAA under federal law; many states require employers with fewer than 15 employees to comply with ADAAA rules and regulations.
- People who are protected by the ADAAA include people who:
 - Have a physical or mental impairment that substantially limits one or more major life activities;
 - Has a history or record of such an impairment; or
 - Is perceived by others as having such an impairment or disability.

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ADAAA: Americans With Disabilities Act Amendments Act

- The ADAAA** requires covered employers to go through in what is known as the "interactive process."
 - The interactive process is used for employers and employees to engage in conversation to discuss possible reasonable accommodations that can be made to enable the employee to perform the essential functions of the job.
- Employers are required to provide reasonable accommodations to qualified employees with disabilities, unless doing so would pose an undue hardship for the company.
 - Note that inconvenience is not the same as an undue hardship under the ADAAA.
- If an employer refuses to engage in the interactive process and/or fails to make reasonable accommodations, they may be leaving themselves open to claims of ADAAA noncompliance.

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FMLA: Family and Medical Leave Act

- The FMLA provides eligible employees with 12 workweeks of unpaid leave to care for themselves (or a family member) in the event of a serious health condition.
 - *Plus other reasons, but this is where FMLA intersects with Workers' Comp and ADAAA*
- Upon return from leave, FMLA requires that the employee must be restored to their original job, or to a job with equivalent pay and benefits.
- The Act also ensures that health benefits for employees taking FMLA leave are maintained as if he or she had continued work.

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FMLA: Family and Medical Leave Act

Covered Employers who are subject to comply with FMLA regulations include:

- Private employers who employ at least 50 employees within a 75-mile (surface miles) radius
- Public sector employers – state and local government, regardless of the number of employees
- Public schools, and private schools regardless of the number of employees.

Eligible Employees: to be eligible for FMLA leave, an employee must:

- Work for a covered employer at a location in the U.S. that employs at least 50 employees within a 75-mile radius;
- Have worked for that employer for at least 12 months; and
- Have worked at least 1,250 hours in that 12-month period.
- Employers that interfere with or deny an employee's rights under FMLA, or that discharge or discriminate against an employee due to any activity related to FMLA leave, put themselves at serious risk of claims for FMLA noncompliance.

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WC: Workers' Compensation

- Workers' compensation is largely regulated on a state-by-state basis, although there are some federal WC regulations that are enforced on the federal level by the Office of Workers' Compensation Programs (OWCP).
- Most workers' compensation laws are similar in that they require employers to provide certain benefits (medical expenses, death benefits, lost wages, vocational rehabilitation, etc.) to employees who suffer a work-related injury or illness
 - Specific amounts and eligibility requirements may vary across different jurisdictions.
- In most states, employers meet their obligation to provide workers' compensation by purchasing workers' compensation coverage from an insurance carrier.
 - A few states require workers' comp coverage be secured through state-operated funds.
 - Other states do not establish a requirement to purchase workers' compensation insurance – most notably, Texas.

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WHEN ADAAA, FMLA, and WC OVERLAP

- **What's the main issue with the workers' compensation, FMLA, and ADA overlap?**
- If a worker is on leave because of a work-related injury that qualifies for workers' compensation, the leave may also qualify as FMLA leave.
- Employers will generally want to designate qualified workers' compensation leaves as FMLA leaves in order to begin exhausting the 12-week leave allotment.
- The work-related injury may also qualify the employee for protections under the ADA (e.g., if the injury substantially limits a major life activity), in which case, an accommodation may be needed.

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WHEN ADAAA, FMLA, and WC OVERLAP

WORKERS' COMPENSATION + ADAAA

- If an employee is injured in a work-related accident, they may be entitled to benefits provided under workers' compensation.
- If that employee develops a disability that limits a major life activity as a result of that injury, he or she might also then be protected by the ADA.
- If this is the case, the employer should make sure to go through the interactive process with the employee to determine what/if any reasonable accommodations might need to be made.

FMLA + ADAAA

- If an employee sustains an injury or develops a serious health condition that is unrelated to work, he or she might be entitled to take up to 12 workweeks of job-protected leave to care for themselves under FMLA.
- If that condition also limits a major life activity, he or she may also be protected by the ADA.

WC + FMLA + ADAAA

- If an employee sustains a work-related injury that substantially limits one or more major life activities and needs to take leave to care for themselves, he or she might be protected by all 3 laws.

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THE "MILITARY" BERMUDA TRIANGLE

Add to your analysis of the ADAAA, FMLA & WC

- New Uniformed Services Employment and Reemployment Rights Act (USERRA)
- The FMLA Amendments Regarding Military Family Members
- Addition of "Qualifying Exigency" Leave
- Military Care Giver Leave
- New Model Certification Forms for the Above Leaves
 - More Coordination and Interaction



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THE "MILITARY" BERMUDA TRIANGLE

New Uniformed Services Employment and Reemployment Rights Act (USERRA)

- Eligibility under USERRA is generally a matter of giving proper notices to the employer and not spending more than five cumulative years on military leave.
- USERRA applies to all employers, regardless of size, and to all regular employees, regardless of position or full- or part-time status.
- USERRA regulates LOAs taken by members of the uniformed services, including Reservists, and by National Guard members for training, periods of active military service, funeral service honors duty and time spent being examined to determine fitness to perform such service.



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THE "MILITARY" BERMUDA TRIANGLE

USERRA – cont.

- USERRA provides four important benefits related to military leave:
 1. Protection from discrimination on the basis of military service.
 2. Protection from termination for a period after returning from service.
 3. The right to re-employment on conclusion of military service.
 4. Certain rights in connection with pensions and other employee benefits plans.
- Several aspects of USERRA leave are unique to the military leave situation and *are different from FMLA leave*. Employers should be aware of, and comply with, these aspects of USERRA leave.



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THE FMLA, ADAAA, and the PDA

- The Pregnancy Discrimination Act (PDA) amended Title VII of the Civil Rights Act of 1964 to protect employees from discrimination based on pregnancy, childbirth or related medical conditions.
 - Under the PDA, employer policies and practices should provide the same benefits to women who are pregnant as they do for employees with other types of medical conditions.
 - Under the FMLA, an eligible employee who works for a covered employer is entitled to up to 12 workweeks of leave for pregnancy, childbirth or related medical conditions.
 - An employee eligible for FMLA leave under these circumstances is also entitled to protection from discrimination under the PDA.
 - The PDA applies to all employers with 15 or more employees, and has no individual eligibility requirements such as those under the FMLA.

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THE FMLA, ADAAA, and the PWFA

- The Pregnant Workers Fairness Act (PWFA), which took effect on January 1, 2023, has a few areas of overlap with the Americans with Disabilities Act, and the Family and Medical Leave Act. See the EEOC site, "[What You Should Know About the PWFA](#)"
- The PWFA requires employers with 15 or more employees to engage in an interactive process to determine temporary reasonable workplace accommodations for pregnant applicants and employees with conditions related to pregnancy and/or childbirth, and to provide such accommodations if doing so would not impose an undue hardship.
 - The PWFA took effect at the first of this year.
 - Employers should be mindful of these expanded protections for pregnant employees and carefully consider accommodations that may be needed as a result of their pregnancy.

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THE FMLA, ADAAA, and the PWFA

- FMLA and the PWFA can address childbirth, preparations therein and caregiving afterward.
- Where the FMLA grants workers 12 weeks of unpaid but job-protected leave, the PWFA requires employers to provide on-the-job "reasonable accommodations" for workers.
- This legislation elevates the conditions of pregnancy — including morning sickness and preeclampsia — to ADAAA-covered disability status.
 - The PWFA extends requirements under the ADA, providing accommodations for "severe" pregnancy-related conditions and childbirth-related complications, such as preeclampsia or morning sickness.
 - Exceptions from other policies may be required as well. For example, employers with "clean desk" policies should consider allowing a pregnant employee to have drinks or food while they work.
 - **NOTE** that unlike the ADAAA, that the PWFA ensures that the responsibility of determining proper accommodations belongs to the expecting employee and their doctor, not the doctor.
 - **NOTE** that the PWFA does not replace federal, state, or local laws that are more protective of workers affected by pregnancy, childbirth, or related medical conditions.

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FAMILY AND MEDICAL LEAVES IN CALIFORNIA

- California employees are protected by several state leave laws, in addition to the federal FMLA, that expand the complexity of the Bermuda Triangle:
 - **The California Family Rights Act** – Covers ERs with 5 or more EEs as of Jan 1, 2021; new differences in coverage from the FMLA. The amended CFRA eliminated the Parent Leave Act, which is now incorporated into CFRA
 - **California Military Family Leave** – ERs with 25 or more EEs provide 10 days unpaid leave while spouse on leave from deployment
 - **California Pregnancy Disability Leave** - ERs with 5 or more EEs provide "reasonable period of leave" for disability relating to pregnancy, childbirth, or related conditions, not to exceed four months. PDL doesn't count against under the CFRA.
 - **California Paid Temporary Disability Insurance** - temporary disability insurance program, funded by withholding from employee paychecks.
 - **California Paid Family Leave** - Eligible employees may collect the same benefits available for a temporary disability for up to six weeks in order to bond with a new child or care for a seriously ill parent, spouse, domestic partner, child, sibling, grandparent, grandchild, and parent-in-law.
 - <https://edd.ca.gov/en/disability/faqs-fmla-cfra/> - EDD FAQs on FMLA and CFRA
 - <https://www.calchamber.com/california-labor-law/fmla-cfra-overview> - Great resources from CalChamber

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FMLA, CFRA, PDL, and SDI IN CALIFORNIA – Charts from Newfront

Fast Facts – FMLA

Employers	Employers with 50 or more employees within a 75-mile radius
Duration of Leave	Up to 12 weeks during a 12-month period, or up to 26 weeks to care for an injured service member
Reason for Leave	<ul style="list-style-type: none"> • Birth and care of a newborn child • Placement of an adopted or foster child with the employee • To care for an immediate family member with a serious health condition • Employee's own serious health condition (including incapacity due to pregnancy)
Eligibility	Employed at least 12 months and at least 1,250 hours over the past 12 months
Benefits	Under the same conditions as when active
Job Protection	Employee must be restored to original or equivalent job with equivalent pay, benefits and other terms and conditions of employment
Compensation	Unpaid – employee may be eligible for SDI, PFL or may use PTO, sick or vacation days

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FMLA, CFRA, PDL, and SDI IN CALIFORNIA – Charts from Newfront

Fast Facts – California Family Rights Act (CFRA)

Employers	Employers with 5 or more employees statewide
Duration of Leave	Up to 12 weeks during a 12-month period, or up to 26 weeks to care for an injured service member
Reason for Leave	<ul style="list-style-type: none"> • Birth and care of a newborn child; including child of a domestic partner • Placement of an adopted or foster child with the employee • To care for an immediate family member with a serious health condition including grandparents, grandchildren, siblings and children of a domestic partner • Employee's own serious health condition excluding pregnancy
Eligibility	Employed at least 12 months and at least 1,250 hours over the past 12 months
Benefits	Under the same conditions as when active
Job Protection	Employee must be restored to original or equivalent job with equivalent pay, benefits and other terms and conditions of employment
Compensation	Unpaid – employee may be eligible for SDI, PFL or may use PTO, sick or vacation days

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FMLA, CFRA, PDL, and SDI IN CALIFORNIA – Charts from Newfront

Fast Facts – California Pregnancy Disability Leave

Employers	Employers with 5 or more employees
Duration of Leave	Up to 17 1/3 weeks per pregnancy
Reason for Leave	Disabled by pregnancy
Eligibility	Female employees disabled by pregnancy
Benefits	Under the same conditions as when active
Job Protection	Employee must be restored to original or equivalent job with equivalent pay, benefits and other terms and conditions of employment
Compensation	Unpaid – employee may be eligible for SDI, or may use PTO, sick or vacation days

Fast Facts – California State Disability Insurance (SDI)

Employers	Employers with 1 or more employees
Duration of Leave	Up to 52 weeks per disability
Reason for Leave	Unable to work due to a non-work-related illness, injury or pregnancy.
Eligibility	Have earned at least \$300 from which SDI deductions were withheld during the base period
Benefits	No required continuation of benefits; but may be required under FMLA or CFRA which may run concurrently
Job Protection	No job protection; but may be required under FMLA or CFRA which may run concurrently
Compensation	60% - 70% (depending on income) of wages earned up to a maximum of \$1,540 per week.

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FMLA, CFRA, PDL, and SDI IN CALIFORNIA – Charts from Newfront

CFRA Coordination with FMLA

- Leave taken by an employee under CFRA runs *concurrently* with FMLA, except where leave is taken under FMLA for disability due to pregnancy, childbirth or related medical conditions. **Leave for pregnancy or pregnancy-related disability counts only toward the employee's FMLA leave entitlement (as well as toward PDL, as discussed below) and not toward the leave rights granted under CFRA.** This is because CFRA specifically excludes leave taken for disability due to pregnancy, childbirth, or related medical conditions as a serious health condition of the employee. As a result, an employee who exhausts FMLA (and PDL) for a pregnancy-related disability is still entitled to leave under CFRA in order to bond with the newborn child.

PDL Coordination with FMLA and CFRA

- The FMLA treats any period of incapacity due to pregnancy or for prenatal care as a serious health condition which entitles the employee to leave. As a result, **leave taken for pregnancy-related disability will count toward both the employee's FMLA and PDL entitlements** (so the leave periods will run *concurrently*).
- However, because CFRA does not include leave taken for disability due to pregnancy, childbirth or related medical conditions as a serious health condition of the employee, **PDL does not run concurrently with leave under CFRA.** As a result, an eligible employee who is certified to take the full 17 1/3 weeks of PDL (concurrently with the 12 weeks of FMLA) and then 12 weeks of CFRA for baby bonding, will have a combined total of 7 months of leave.

San Francisco Paid Parental Leave

- Employees who work at least 8 hours per week in San Francisco and work at least 40% of their weekly hours in San Francisco are eligible to receive up to 100% of their weekly wages during the CA PFL new child bonding period capped at **\$2,567 for 2022** (60% from PFL and 40% from the employer).

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OTHER STATES' LEAVE REQUIREMENTS

- Almost all states have enacted laws providing for leave in certain "family," "medical" and "military-related" situations. Every state has a military leave law.
- States usually provide greater protections to employees than is provided under federal law.
 - For example, a state may provide the same protections afforded under the FMLA or the ADAAA but make them applicable to every employer even if there is only one employee.
 - A state may require family leave to address situations such as attending parent-teacher conferences or funerals.
 - A state may require leave to be paid by the employer.
 - When an employer has an employee working in a state other than the principal place of business, the employee may have the protections of that state's leave laws as well.
- HR professionals faced with LOA situations must be up-to-date on the status of the applicable state law.

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RECOGNIZING THE NEED FOR AN ACCOMMODATION

- **ADAAA:** According to the EEOC, an employee must let the employer know that s/he needs an adjustment or change concerning some aspect of his or her job duties for a reason related to a medical condition.
 - The request does not have to include words, such as "reasonable accommodation" or "disability."
 - The employer should ask the employee whether s/he is requesting a reasonable accommodation if the nature of the initial communication is unclear.
 - Request can also be made "on behalf of" employee (doctor, family member, etc.)
- The EEOC's guidance provides that **"an employer should initiate the reasonable accommodation interactive process without being asked if the employer:**
 - (1) knows that the employee has a disability,
 - (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and
 - (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation."
 - In other words, employers must recognize the need for accommodation even in the absence of an employee request.

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RECOGNIZING THE NEED FOR AN ACCOMMODATION

So when does an employer have adequate or sufficient notice to initiate the ADAAA interactive discussion without receiving a request for accommodation from the employee?

First, the employer must have notice that the employee has a "disability."

- Notice provided to supervisors or managers will be imputed to the employer.
- Notice may come from the employee directly, or from the employee's family members, friends, health professionals or other representatives.
- Notice may also come as a result of administering FMLA leave or a workers' compensation claim.
- Notice does not need to disclose the employee's specific condition. For example, it is sufficient if the employer receives notice of treatment needed by an employee.
- Notice may also come in the form of objective proof, such as sudden or increasing inability to perform job functions or other physical manifestations of symptoms that are readily observable to others in the workplace.
- If the need to accommodate is obvious, an employer cannot simply wait for an employee to expressly request an accommodation.
- An employer also cannot ignore these things simply because an employee has been cleared to return to work – with or without restrictions.

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RECOGNIZING THE NEED FOR AN ACCOMMODATION

Second, the employer must also have notice of the employee's desire to obtain some type of accommodation.

- Notice of a disability alone is not enough to trigger the obligation to initiate the interactive process. This is particularly true if the employer has no indication the disability is impacting the employee's ability to perform his or her essential job functions.
- Notice of an employee's desire for an accommodation can take a variety of forms, including notice that the employee wants to remain employed (in some capacity).
- The standard of proof required here is low: when an employee continues to come to work and continues to perform at least some of his or her essential duties, employers are encouraged to proceed with the interactive process.
- Employers must also act promptly to initiate this discussion. Failure to engage in the interactive process (IP) does not, in and of itself, result in liability under the ADAAA. But failure to engage in the IP may prevent an employee from receiving a reasonable accommodation, and thus may result in liability under the ADAAA.
- The Job Accommodation Network (JAN) has excellent resources for employers:
 - [EMPLOYERS' PRACTICAL GUIDE TO REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT \(ADAAA\)](#)

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RECOGNIZING THE NEED FOR FMLA LEAVE

- **FMLA:** According to the DOL, an employee must provide at least verbal notice sufficient to make the employer aware of the need for FMLA-qualifying leave and the anticipated timing and duration of the leave.
 - The first time an employee seeks leave for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA.
 - When an employee seeks leave for an FMLA-qualifying reason for which the employer has previously provided FMLA leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave.
 - “Constructive Notice” may also trigger employer’s obligations.


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RECOGNIZING THE NEED FOR WC NOTIFICATION

- **Worker’s Compensation:** On the job injury or notification within 30 days by employee. *(Check your state requirements, and WC carrier requirements)*
 - Best practice is to require notification as soon as possible, **by policy**
 - Be sure your supervisors and managers are aware of this requirement, as well as reporting requirements by the employer to the WC carrier



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TRIGGERING EVENTS

- **“Constructive Notice” Under FMLA & ADAAA**
 - “Constructive Notice” is knowledge which a person or entity
 - is presumed (or duty bound) to acquire by making normal and reasonable inquiries; or
 - Should have known, as a reasonable person would have, even if they have no direct or actual knowledge of it.
 - Constructive notice under the FMLA and the ADAAA generally means that the employer has “reason to believe” that leave or an accommodation may be warranted.
 - Employers must look for inconsistent behavior that could be attributable to a serious health condition, and when appropriate, have to inquire delicately if this inconsistent behavior is impacting performance.

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TRIGGERING EVENTS

- **“Constructive Notice” Under FMLA & ADAAA**
 - Employers with constructive notice of an employee’s potential need for leave have an affirmative duty to notify their employee of the right to leave or a job accommodation - even if the employee is unaware that he or she suffers from a specific qualifying serious health condition or that he or she is entitled to an accommodation.
 - Constructive notice clues:
 - Changes in production
 - Changes in attitude
 - Requests for assistance
 - Requests for changes in responsibilities
 - Recurring leave requests.

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TRIGGERING EVENTS

- **ADAAA:** Employer may request medical certification regarding the nature, severity, and duration of the condition, and request an opinion on whether employee can perform the essential functions or his or her job, with or without an accommodation.
 - If an accommodation is needed, the employer can seek recommendations on the types of accommodations that would suffice.
 - **Additional correspondence with the physician is allowed for clarification purposes.**

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DOCUMENTATION REQUIREMENTS


- **FMLA:** Employer provides employee with FMLA Certification Paperwork. Employee has 15 days to return paperwork.
 - If further clarification is needed, employee has 7 days to provide requested follow-up documentation.
 - Employer may also request a 2nd medical opinion, or a 3rd medical opinion if the 1st and 2nd opinions differ.
- **Workers' Compensation:** Generally handled through worker's compensation provider.
 - Directed Care: Employer must designate approved medical providers.
 - Employee may choose medical provider.

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DOCUMENTATION REQUIREMENTS




- **FOR ADAAA, FMLA, AND WORKERS' COMPENSATION:**
- **The most common problem we see, is that employers fail to force the medical provider to provide clear and comprehensive information that you can use to explore reasonable accommodations and return-to-work.**
 - Use a cover memo to the medical provider to communicate what you already know, to ensure that the provider knows your perspective on issues of concern.
 - Direct the provider to focus on medical limitations and restrictions pertaining to the employee's ability to perform the essential functions of the job.
 - Provide complete job description – essential functions
 - Use a comprehensive ADAAA assessment of the position

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DOCUMENTATION REQUIREMENTS



GOOD JOB DESCRIPTIONS ARE CRITICALLY IMPORTANT

- While not legally required, a well-written job description can be your best friend.
 - Essential functions – ADAAA, WC, and FMLA
 - Physical requirements – ADAAA, WC, and FMLA
 - Mental requirements – ADAAA, WC, and FMLA
- Must be current, accurate, and complete
 - Focus on **essential function outcomes**, not tasks per se
- Critically important in managing an employee's return/transition to work
- Recommend a comprehensive assessment of each job to supplement the job description.

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FMLA: ENFORCED BY U.S. DEPARTMENT OF LABOR

- **Covered** employers must grant an FMLA-eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month period (rolling 12 months) for one or more of the following reasons:
 - For the birth and care of the newborn child of the employee;
 - For placement with the employee of a son or daughter for adoption or foster care;
 - To care for an immediate family member (spouse, child, or parent) with a serious health condition; OR
 - **To take medical leave when the employee is unable to work because of a serious health condition of their own.**
 - Military FMLA

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FMLA: COVERED EMPLOYER & EMPLOYEES

- A **Covered Employer** has 50 or more employees within a 75-mile “surface” radius.
- However **ALL Public Agencies and schools** are covered without regard for number of employees.
 - **Note:** Small Municipality, Charter School examples – covered employers MUST follow FMLA administrative procedures even if there are no covered employees in the school
- **Eligible Employees** have been employed for at least 12 months and have worked at least 1,250 hours during the immediately preceding 12 months before going on FMLA.
- **Posting Requirements** regardless of employee count or eligible employees.

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THE ADA AMENDMENTS ACT (ADAAA)

- Enforced by the U.S. DOL Equal Employment Opportunity Commission (EEOC)
- Applies to employers with **15 or more employees** working at least 20 weeks in the current or preceding calendar year; part-time employees count as whole employees
 - Check your State – e.g. In New Mexico, ADAAA applies to employers with **3 or more employees**.
- **Qualified Individuals:** Employees and applicants who with or without a reasonable accommodation can perform the **essential functions** of the job.

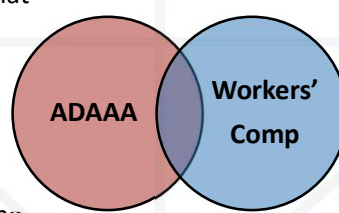
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EEOC GUIDANCE ON WC AND ADAAA INTERACTION

- EEOC indicates – just because a person has a “disability” as defined by WC, that person does not necessarily have a “disability” for ADA.
- Just because a person has filed a WC claim does not necessarily mean that person has a “record” of disability.
- Not automatically “regarded” as having a disability under ADAAA simply due to disability rating under WC laws.



The diagram consists of two overlapping circles. The left circle is red and labeled 'ADAAA'. The right circle is blue and labeled 'Workers' Comp'. The overlapping area in the center is shaded purple.

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PRE-EMPLOYMENT INQUIRIES

• ADA

- May ask about reasonable accommodation when:
 - Applicant is told what the hiring process involves
 - Applicant has an obvious disability
 - Described or demonstrated how applicant would perform job

• FMLA

- No requirements
- Not advisable to ask about previously taken leave

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POSTOFFER INQUIRIES AND EXAMINATIONS

ADAAA

- Reasonable accommodation and documentation
- Pre-employment physical
- Medical exams and disability inquiries

FMLA

- No specific requirement for post offer inquiries
- Returning employee may be required to provide a fitness-for-duty certificate

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GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

Prohibits employers from:

- Requesting, obtaining, or using genetic information
- Genetic information includes:
 - Information about an individual's genetic tests
 - Genetic tests of family members
 - Family medical history (diseases or disorders of family members)
- Don't ask for diagnosis on medical certifications

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GINA NOTICE—ADAAA

Employers requesting medical information:

- *Must* direct the healthcare provider *not to provide genetic information*
- Should include the "safe harbor" notice
- When requesting medical information about an employee, use the standard safe harbor notice
- When requesting medical information about a family member, add "Please note that information about the health condition of your patient may be provided as needed to complete the certification request."

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MEDICAL CERTIFICATION

ADA

- If the employee requests an accommodation and the disability is not obvious

FMLA

- For a medical condition, the employer may require that the employee provide certification from a healthcare provider

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INDEPENDENT MEDICAL EXAMINATIONS

ADA

- When disability documentation is insufficient
- Conducted at the employer's expense

FMLA

- When employer has reason to doubt medical certification
- Conducted at the employer's expense

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DISQUALIFYING EVENTS

ADA

- Failure to provide necessary medical information
- Refusal of a reasonable accommodation

FMLA

- Delay in returning completed medical certification (delays FMLA leave)
- Failure or refusal to return certification

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UNDUE HARDSHIP

ADA

- Accommodation not required
- Consider the nature and cost of the accommodation

FMLA

- No undue hardship provision

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SUBSTANCE ABUSE

<p>ADA</p> <ul style="list-style-type: none"> Alcoholism covered as a disability Current illegal drug use not covered Drug tests not prohibited 	<p>FMLA</p> <ul style="list-style-type: none"> Current drug or alcohol addiction covered if condition qualifies as a "serious health condition" Employee must be receiving treatment or rehabilitation
---	---

A Venn diagram with two overlapping circles. The left circle is red and labeled 'ADA'. The right circle is yellow and labeled 'FMLA'. The overlapping area is shaded brown.

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LEAVE REQUIREMENTS

<p>ADA</p> <ul style="list-style-type: none"> No paid or unpaid leave requirement Depends on reasonable accommodation and accrued leave 	<p>FMLA</p> <ul style="list-style-type: none"> 12 weeks of unpaid leave for birth of a child, adoption or foster placement, a family member's serious health condition, the employee's serious health condition, or a qualifying exigency 26 weeks of unpaid leave for service member caregiver leave May substitute accrued paid leave
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A Venn diagram with two overlapping circles. The left circle is red and labeled 'ADA'. The right circle is yellow and labeled 'FMLA'. The overlapping area is shaded brown.

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TRANSITIONAL/RESTRICTED/LIGHT DUTY

<p>ADA</p> <ul style="list-style-type: none"> May provide a transitional/restricted duty position as a reasonable accommodation Not required to create transitional/restricted duty position 	<p>FMLA</p> <ul style="list-style-type: none"> For non-intermittent leave, employer cannot insist on transitional/restricted duty duty hours do not count as FMLA leave
---	--

A Venn diagram with two overlapping circles. The left circle is red and labeled 'ADA'. The right circle is yellow and labeled 'FMLA'. The overlapping area is shaded brown.

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TERMINATION

<p>ADA</p> <ul style="list-style-type: none"> Permitted if employee cannot perform job and no reasonable accommodation can be made 	<p>FMLA</p> <ul style="list-style-type: none"> Permitted if an employee fails to return to work and if the ADAAA does not offer additional protection
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A Venn diagram with two overlapping circles. The left circle is red and labeled 'ADA'. The right circle is yellow and labeled 'FMLA'. The overlapping area is shaded brown.

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RECORDKEEPING AND REPORTING

<p>ADA</p> <ul style="list-style-type: none"> Recommended to record requests for accommodation, attempt(s) to accommodate, and reason(s) that attempts to accommodate were not successful Medical information is confidential 	<p>FMLA</p> <ul style="list-style-type: none"> Keep records for at least a 3-year period Medical information is confidential
--	---

A Venn diagram with two overlapping circles. The left circle is red and labeled 'ADAAA'. The right circle is yellow and labeled 'FMLA'. The overlapping area in the center is a darker shade of red.

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RETALIATION

<p>ADA</p> <ul style="list-style-type: none"> No discrimination or retaliation against any person (disabled or not) who has exercised rights under the ADA, taken action, or assisted in any action under the ADA, regardless of whether the person has a covered disability 	<p>FMLA</p> <ul style="list-style-type: none"> No discrimination or retaliation against any person (eligible for leave or not) who has taken action or assisted in any action under the FMLA
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A Venn diagram with two overlapping circles. The left circle is red and labeled 'ADAAA'. The right circle is yellow and labeled 'FMLA'. The overlapping area in the center is a darker shade of red.

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EMPLOYER LIABILITY

<p>ADA</p> <ul style="list-style-type: none"> Acts of employer, supervisors or agents, co-workers, third-party nonemployees Back pay, reinstatement, front pay, attorney's fees, and other equitable relief, if appropriate 	<p>FMLA</p> <ul style="list-style-type: none"> Acts of employer, supervisors, managers, other agents Wages, reinstatement, promotion, lost benefits, attorney's fees, and interest For willful violations, double damages may be awarded
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A Venn diagram with two overlapping circles. The left circle is red and labeled 'ADAAA'. The right circle is yellow and labeled 'FMLA'. The overlapping area in the center is a darker shade of red.

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SCENARIO #1— REINSTATEMENT

<p>ADA</p> <ul style="list-style-type: none"> Requires reinstatement to same position If same position is no longer available, must place in lower vacant position No "bumping" or promotions required 	<p>FMLA</p> <ul style="list-style-type: none"> Requires reinstatement to same or equivalent position Required only if employee can still perform essential functions of job
--	--

A Venn diagram with two overlapping circles. The left circle is red and labeled 'ADAAA'. The right circle is yellow and labeled 'FMLA'. The overlapping area in the center is a darker shade of red.

ADVICE
Can be placed in lower-level position at a lower rate of pay under the ADA

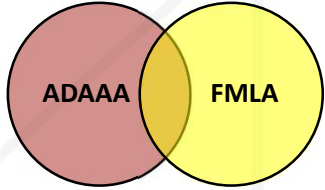
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Scenario #2 - Medical Exams

<p>ADA</p> <ul style="list-style-type: none"> Exam allowed if job related and consistent with business necessity Full physical not allowed 	<p>FMLA</p> <ul style="list-style-type: none"> Fitness-for-duty certification required only for return to work (if FMLA applies)
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ADVICE

- Back examination allowed under the ADA
- ADAAA overrides the FMLA

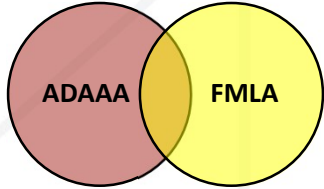
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Scenario #3—Benefits

<p>ADA</p> <ul style="list-style-type: none"> Does not require continuation of benefits during leave unless employer continues for other types of unpaid leave 	<p>FMLA</p> <ul style="list-style-type: none"> Requires continuation of coverage at same level for group health plan
--	--



ADVICE

- Must continue coverage regardless of whether employer does so for other unpaid leave
- FMLA overrides ADA

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WORKERS' COMPENSATION: Enforced by State Workers' Comp Agency

- Worker's Compensation Leave:** There are no per se leave requirements under most states' workers' compensation statutes.
 - However, leave generally is considered part and parcel of receiving medical treatment for injuries arising out of and in the course and scope of the employment relationship
- Additional Workers' Compensation Rights for Employees:**
 - Payment of authorized doctor's bills, rehabilitation, physical therapy, prescriptions, and necessary travel expenses.
 - Additional compensation in the form of weekly benefits, depending on severity of the injury, and ability of the employee to work.
 - In some cases, lump-sum settlement payment when employee reaches maximum medical improvement and continues to be "disabled."

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WORKERS' COMPENSATION ACTS

- WC Acts typically affect all employers who have three or more employees regularly employed in the same business. In most states, employers are REQUIRED to carry WC insurance.**
 - Smaller employers may voluntarily carry WC insurance
 - Texas does NOT require employers to carry workers' compensation insurance.
 - Although private employers in Texas don't have to carry workers' comp coverage, they're subject to reporting and notification requirements if they choose not to do so.
 - In most states, any employer with even one employee has to have coverage; in other states, the minimum may range from two to five employees.
 - A few states exempt certain agricultural or construction businesses; charities may also be allowed to opt out of the system. Provides remedy for industrial accidents, injuries, and occupational diseases.
 - Very large employers or pools may insure themselves, but they must apply with the state and meet stringent self-insurance requirements.

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WORKERS' COMPENSATION COMMON QUESTIONS

What are my responsibilities in WC as an employer?

- Purchase a workers' compensation insurance policy
- Employers must post required notices in a convenient location frequented by employees during working hours. The notices or posters must:
 - include important information about employees' right, including the right to receive medical treatment
 - give details about available workers' compensation benefits, and
 - provide the name of the company's workers' compensation carrier, or the fact that the employer is self-insured, as well as who is responsible for adjusting claims.
 - Employers must also provide the same notice to new hires.
- Pay the workers' compensation fee (if required by the state)

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WORKERS' COMPENSATION COMMON QUESTIONS

What are my responsibilities in WC as an employer?

- Inform workers in writing of the health care provider selection
- After a workplace accident has occurred, the employer must sign and provide the worker with a copy of the notice of accident form that was signed by the worker, if one has been submitted
- Report accidents to the insurer within a specified period of time – e.g. 72 hours in New Mexico
- Inform the insurer if the worker has missed (seven) days of work because of a workplace injury
- Allow the insurance carrier to accept or reject the claim filed by the injured worker
- Institute a drug-and-alcohol free workplace policy.

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WORKERS' COMPENSATION COMMON QUESTIONS

What are my responsibilities in WC as an employer?

- Typically, employers must provide injured employees with a workers' compensation claim form within 24 hours after the employee has given notice of an on-the-job injury or work-related illness.
- Even if the employee hasn't given this notice, the employer may still be obligated to provide the forms if it knew about the injury.
- Employers must also supply the employee with written information (usually a pamphlet) about the employee's rights under the workers' comp system. The written material should provide details about available benefits and how to file a claim.

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WORKERS' COMPENSATION COMMON QUESTIONS

Does a workers' compensation injury always qualify for FMLA?

- No.
- In order to constitute a serious health condition under the FMLA, the injury must meet FMLA criteria (e.g., it must require continuing medical treatment for a period of 3 or more days).
- An employee could sustain an injury at work that required a single medical visit—for example, a minor sprain.
- Workers' compensation would probably apply and cover the employee's medical expenses but, unless the sprain were severe enough to require continued medical treatment and to require that the employee be away from work for 3 or more days, it would not qualify for FMLA.

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WORKERS' COMPENSATION COMMON QUESTIONS

Does a workers' compensation injury or illness or an FMLA serious health condition necessarily constitute an ADA disability?

- No. An ADA disability is an impairment that “substantially limits one or more major life activities” (caring for oneself, performing manual tasks, walking, seeing, hearing, sitting, standing, bending, lifting, speaking, breathing, learning, and working).
- It also includes cognitive skills and the capacity to concentrate, remember, and reason, or having a record of such an impairment or being regarded as having such an impairment.
- Many workers' compensation injuries are not “disabilities” under the ADA, meaning that they may not substantially limit a worker's ability to perform a major life activity.

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WORKERS' COMPENSATION COMMON QUESTIONS

What does it mean that workers' compensation and FMLA leave run concurrently?

- If the employer designates a workers' compensation leave as an FMLA leave as well, it means that the normally unpaid FMLA leave will probably be paid to some degree because wage replacement will be paid by workers' compensation.
- It also means that the person may not be fired for absence, even if the person is out of work beyond the employer's cut-off absence day.
- However, it also means that if the WC injury is lengthy, and the employee is unable to return to work, you may be able to terminate the employee
 - **Remember: the ADAAA Interactive Process must be used before termination**

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WORKERS' COMPENSATION COMMON QUESTIONS

Can the employer fire the worker out on leave?

- **Workers' compensation:** In almost all states, it is illegal to fire an employee expressly for filing for or using workers' compensation benefits.
 - However, employers may fire an employee out on workers' compensation for violating a neutral and consistently enforced employee absence program or if the employee is not able to do his or her job.
 - A few states require that the employer make every effort to reinstate the employee to his or her former job or an equivalent job if possible. Employers should check the law in their own state.
- **FMLA:** FMLA guarantees the employee's right to restoration to the same job or an equivalent job when the employee returns to work.
 - Additionally, time out on FMLA leave may not be counted as absence at all.
 - The FMLA also prohibits employers from retaliating against employees for taking an FMLA leave. Therefore, if an employer terminates an employee during or shortly after an FMLA leave, the employer runs the risk that the termination will be perceived to be retaliatory, exposing the employer to potential liability.

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WORKERS' COMPENSATION COMMON QUESTIONS

Can the employer fire the worker out on leave?

- **ADA:** A qualified individual with a disability is entitled to return to the same or an equivalent position unless the employer demonstrates that holding the position open would impose an undue hardship.
 - An employer may not apply a “no-fault” leave policy (under which employees are automatically terminated after they have been on leave for a certain period of time) to an employee with a disability who needs leave beyond the set period.
 - Instead, the employer must modify its no-fault leave policy to provide the employee with the additional leave, unless it can show that an undue hardship would result.

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WORKERS' COMPENSATION COMMON QUESTIONS

Who selects the doctor of an injured worker?

- Either you or the employee has the right to select the treating physician for the injury.
 - **Directed Care Option** – Employer Selects
 - **Employee Choice** – Employee Selects
- It is recommended that you check with your workers' compensation insurance broker or carrier beforehand to determine if the insurer has a preference.
 - BUT ... in New Mexico, a second medical opinion prevails, so most recommend (including PRAXIS Management Solutions) Employee Choice.
 - NOTE – Emergency Care is separate issue
- Your decision on doctor selection should be communicated to the worker in writing as quickly as possible.
- **CHECK THIS ISSUE IN YOUR STATE (Or States if you are in multiple jurisdictions)**

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WORKERS' COMPENSATION COMMON QUESTIONS

What if the worker is given restrictions by the doctor on the type of work s/he can perform?

- As the employer, you should consider whether you have work available for the worker within the medical restrictions recommended by the doctor.
- If so, you are encouraged to offer work within those restrictions.
 - **NOTE – You are now in the ADAAA Zone! Reasonable Accommodations!**
 - Remember ... statistically, the longer an employee is out on workers' compensation, the longer they are likely to stay out.
- Doing so will likely maintain a positive employment relationship and save on your bottom line in the long run.

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WORKERS' COMPENSATION COMMON QUESTIONS

What are my return to work and rehiring obligations following a job accident?

- You are typically not required to hold a workers' position open following a job accident and/or worker's inability to return to work. You can replace the worker.
- However, once the worker reaches Maximum Medical Improvement and is released by the doctor to return to work, you are required by law to offer to rehire the worker if:
 - The worker requests re-employment;
 - You are hiring;
 - The treating doctor certifies the worker is fit to perform the pre-injury job or a modified duty job without significant risk of re-injury;
 - The job is available.

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WORKERS' COMPENSATION COMMON QUESTIONS

What are my return to work and rehiring obligations following a job accident? (Cont.)

- If you are hiring, you shall also offer to rehire the worker who applies for any job paying less than the pre-injury job,
 - provided the worker is qualified for the job,
 - and the doctor certifies that the worker is fit to perform the job offered without significant risk of re-injury.
- Employers must treat injured workers in good faith and not punish them or terminate them solely because they were injured and thereafter seek workers' compensation benefits.

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WORKERS' COMPENSATION COMMON QUESTIONS

So, when should an injured worker return to work?

- The goal is to have the worker return to work (RTW) as quickly as possible.
- **LOSE THE TERM**, “LIGHT Duty” in favor of “RESTRICTED,” or “TRANSITIONAL” Duty.
- An injured worker can return to work once the treating doctor indicates it is all right to do so.
 - At times, the doctor may suggest work restrictions during recovery so that there is no further injury.
 - **NOTE – You are now in the ADAAA Zone – “Interactive Process”**
- It is important for employers to stay in communication with the worker and the insurer’s claims representative as well as the doctor, to ensure the process goes as smoothly as possible.

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WORKERS' COMPENSATION COMMON QUESTIONS

So when should an injured worker return to work? Cont.

- Workers can continue to work during recovery, with the treating physician's approval, or find alternative work while recovery takes place.
 - Workers can expect the employer to offer several job options.
 - Workers can do the usual job, which must pay the same wages and benefits as before the injury.
 - They can do modified work, which allows them to return to the same employer, but with doctor-specified work restrictions.
 - Alternative work may also be available, work which is different from the old job, but meets HCP restrictions.
- Many state WCAs have an Early Return to Work Initiative to assist employers with the RTW process. The service is usually free to all employers, and provides troubleshooting, analysis of current RTW practices, and more.

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LEAVE UNDER FMLA, ADAAA & WC

- **FMLA** – up to 12 weeks in any single 12-month period
- **ADAAA** – no particular cap if reasonable/no undue hardship (indefinite leave not required)
- **WC** – a benefit, not a leave – maximum indemnity benefit is 500 weeks in VA

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PAY UNDER FMLA, ADAAA & WC

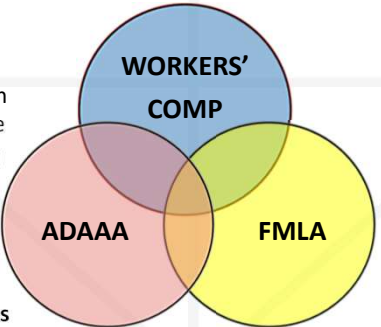
- **FMLA** – unpaid but employee may elect – or employer may require employee to use available paid leave (concurrent with FMLA time)
- **ADAAA** – unpaid, but allowing use of available leave is a form of reasonable accommodation
- **WC** – generally, employees receive disability pay
- **Enforce policies consistent with employees on other types of leaves**

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BENEFITS UNDER FMLA, ADAAA & WC

- **FMLA** – benefits are continued for 12 workweeks on same terms/conditions as if employee is working
- **ADAAA** – no separate benefits continuation requirement beyond the FMLA if applicable
- **WC** – generally, employees may be entitled to lifetime medical benefits and a predetermined number of weeks of indemnity benefits
- **COBRA**
- **Keep employees in the loop about benefits**



The diagram consists of three overlapping circles. The top circle is blue and labeled 'WORKERS' COMP'. The bottom-left circle is pink and labeled 'ADAAA'. The bottom-right circle is yellow and labeled 'FMLA'. The intersections between the circles are shaded with various colors, representing the areas where these laws interact.

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The diagram shows a blue triangle with 'HR BERMUDA Triangle' in the center. The vertices are labeled: 'ADA' at the top, 'FMLA' at the bottom-left, and 'WC' at the bottom-right. The background of the slide features a photo of people in a meeting.

FMLA > ADAAA > WORKERS COMP: AREAS OF INTERACTION & INTERPLAY

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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

- When an employer is subject to the ADAAA, the FMLA and your State's Workers' Compensation Act (WC), you must consider the implications of each law when making any personnel decisions as there are various ways in which these laws can interact with each other.
- Important areas of interplay between the FMLA/ADA/WC are:
 - Employer coverage
 - Employee eligibility
 - Length of leave
 - Benefits/pay while on leave
 - Medical documentation
 - Restricted or Transitional duty
 - Fitness-to-Return-to-Work Certification
 - Reinstatement

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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

While the ADAAA, FMLA and Worker's Comp Laws have common goals, the different approaches create the potential for confusion in their application, especially with employers' leave policies.

- **ADAAA** - prohibits discrimination against applicants and employees who are "qualified individuals with a disability".
- **FMLA** - sets minimum leave standards for employees for the birth and newborn care of a child, placement of a child for adoption or foster care, to care for an immediate family member with a serious health condition, for the employee's serious health condition, and for military exigency leave.
- **Workers' Compensation** - provides for payment of compensation and rehabilitation for workplace injuries.

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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

EMPLOYER COVERAGE

- **ADAAA** – 15 or more employees for 20 weeks during current or preceding calendar year (*NM Law – 3 or more employees*)
- **FMLA** – 50 or more employees within a 75-mile radius for at least 20 weeks during current or preceding calendar year
 - Public agencies, including schools, cities and towns, are covered employers without regard to the number of employees employed.
 - Note, however, that employees may not be covered employees if public agency has fewer than 50 employees.
- **Workers' Compensation** – Applies to most, even small employers. State laws govern.


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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

EMPLOYEE ELIGIBILITY

- **ADAAA** – Employee (or applicant) who is disabled as defined by the ADAAA; qualified for the position; can perform the essential functions of the position, with or without a reasonable accommodation.
- **FMLA** – Employee who has worked at least 12 months and 1250 hours prior to the start of the leave; works at a worksite where there are 50 or more employees within a 75-mile radius.
- **Workers Compensation** – Employee who has an injury arising out of or in the course of employment - state law exceptions possible for willful misconduct or intentional self-inflicted injuries, willful disregard of safety rules, or intoxication from alcohol or illegal drugs.




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ARE APPLICANTS COVERED BY THE ACTS?

- **FMLA** – NO
- **WC** – NO
- **ADAAA** – YES – may have to make reasonable accommodations during the screening, interviewing, and selection phase




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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

LENGTH OF LEAVE

- **ADAAA** – No specific limit for the amount of leave that would be provided as a reasonable accommodation that does not create an undue hardship on the employer.
- **FMLA** – 12 weeks in the 12-month period as defined by the employer (*NOT always firm 12 weeks*)
- **Workers' Compensation** – No specific limit for the amount of leave an injured worker may have.




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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

MEDICAL DOCUMENTATION

- **ADAAA** – Only medical examinations or inquiries regarding an employee's disability that are job-related and limited to determining ability to perform the job and whether an accommodation is needed and would be effective.
- **FMLA** – Medical certification of the need for the leave not to exceed what is requested in the Department of Labor (DOL) Medical Certification Form.
- **Workers' Compensation** – Medical information that pertains to the employee's on-the-job injury.



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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

TRANSITIONAL, RESTRICTED OR LIMITED DUTY

- **ADAAA** – Required to be offered, if it is a reasonable accommodation that does not create an undue hardship on the employer.
- **FMLA** – Cannot be “required”.
- **Workers' Compensation** – Ought to be offered if available as it may eliminate the employee's entitlement to the wage replacement benefit.

TRANSITIONAL EMPLOYMENT PROGRAM


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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

FITNESS-TO-RETURN-TO-WORK CERTIFICATION

- **ADAAA** – Permitted as long as the medical examination and inquiry is job-related and necessary to determine whether the employee can perform the essential functions of the job.
- **FMLA** – Can only be required under a policy or practice that requires employees who have been on a similar type of leave of absence
- **Workers' Compensation** – May be and is typically required.
- **NOTE:** Should have a general “Fitness for Duty” employment policy, and you **MUST** include requirement in letter of designation for leave




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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

BENEFITS WHILE ON LEAVE

- **ADAAA** – No specific requirements but cannot discriminate and must provide same benefits as those provided to employees on non-ADAAA leave of absence.
- **FMLA** – Health coverage must be continued at same level as prior to the leave. Benefits other than health benefits are determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).
- **Workers' Compensation** – Not required to be continued unless run concurrently with FMLA leave.



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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

FMLA AND WC ADMINISTRATIVE ISSUES

- While WC coverage provides medical benefits for the injury, as well as wage replacement under certain circumstances, there is no separate leave entitlement under most workers' compensation plans.
- Employees who require leave as the result of an on-the-job injury may also qualify as having a serious health condition under the FMLA.
- Further, the employee may possibly even be considered disabled under the ADAAA. Therefore, employers should evaluate the need for time off from work following an on-the-job injury under both laws, as well as applicable state law.
- FMLA and WC may run concurrently. When employees take leave from work for an on-the-job injury, employers should be counting that time against the employee's 12 workweeks of FMLA entitlement, if the employee is otherwise eligible for FMLA leave.

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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

FMLA AND WC ADMINISTRATIVE ISSUES

- Time spent on leave for an on-the-job injury still counts toward the employee's 12 months of service requirement under the FMLA.
- Assuming the employee has already met the other FMLA eligibility requirements, an employee could actually become eligible for FMLA leave in the middle of a non-FMLA leave following an on-the-job injury
- If non-FMLA leave converts to FMLA leave in this manner, the employee is entitled to his or her full 12 workweeks of leave for the serious health condition (if the serious health condition requires that much leave).
- Any leave related to an employee's medical condition provided by the employer prior to the employee becoming eligible for FMLA leave does not count toward the FMLA 12-week entitlement.


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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

WHEN EMPLOYEES EXHAUST LEAVE

- Employers should use caution when employees exhaust their FMLA leave following an on-the-job injury, but still cannot return to work. An employer's obligations in this situation may be governed by:
 - The employer's policy on FMLA or other Leave;
 - State workers' compensation laws;
 - The ADAAA; or
 - Other legal obligations.
- Prior to taking any employment action against employees in this situation, the employer should consult with legal counsel about available options.



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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

EXTENDED LEAVE AS AN ADAAA ACCOMMODATION

- **No "auto-terminate" policies**
 - An employee unable to return to work following FMLA leave for a serious health condition is "presumptively disabled" under the ADA
- **Engage in interactive conversation under the ADA**
 - Does employee have a disability
 - Can employee provide window of possible return
 - Undo hardship?
- **No benefits continuation required**
- **COBRA – maybe**
- **Review other policies and past practices - consistency**
- **Document thoroughly**
 - Conversations
 - Emails
 - Letters

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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

Restricted/Transitional duty may be an option for employees injured on the job who cannot return to their regular jobs.

- Under the FMLA, an employer cannot force an employee to accept a restricted/transitional-duty position. Rather, an employee may take FMLA leave - intermittently or on a reduced schedule if medically necessary or in extended blocks of time - if the employee is otherwise eligible for FMLA leave.
- However, if an employee whose physician returns the employee to work in a restricted/transitional-duty position refuses such a position offered by the employer, he or she may be ineligible for continued wage replacement benefits under state law.
- As a result, an employee may transition from a partially paid leave (workers' compensation routinely pays approximately two-thirds of an employee's pre-injury earnings) to a fully unpaid leave.


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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

FMLA MEDICAL CERTIFICATION

- Employers that receive sufficient medical information through the WC process to designate leave following an employee's on-the-job injury as FMLA-eligible need not require the employee to also complete the initial FMLA certification of health care provider.
 - However, the employer's obligations to fulfill the remaining FMLA notice requirements remain unchanged. +29 C.F.R. § 825.306(c).
 - USDOL has told employers to be more flexible during COVID-19 pandemic in requiring medical certification for FMLA or other leaves



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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

WORKERS' COMPENSATION WAGE SUPPLEMENT

- Employees who are on FMLA-covered leave following an on-the-job injury, and who are also receiving wage replacement benefits under an employer's workers' compensation program, may agree with their employer (if state law permits) to substitute available paid time off (vacation, sick, PTO) in order to supplement their workers' compensation payments.
 - Remember the tax effect – in many states, WC payments are non-taxable
- The payment of workers' compensation wage replacement benefits and employer paid time off benefits may equal no more than the employee's pre-injury earnings. *(Check your state's WC regulations)*


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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

REQUIREMENT TO R-T-W WITHOUT RESTRICTIONS

- Many employers have a policy that requires employees who are injured on-the-job to return to work with a full release, without restrictions.
 - In other words, employees who recover from their injuries sufficiently to enable them to return to work, but who have certain medical restrictions, are not permitted to return to work.
- For the same reasons that "no-fault" attendance policies are problematic under the ADAAA, these types of "full release only" policies also pose a problem.
- **IF YOU HAVE THIS POLICY, LOSE IT IMMEDIATELY!!!**



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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

REQUIREMENT TO R-T-W WITHOUT RESTRICTIONS

- By refusing to allow an employee to return to work with restrictions, an employer has failed to make an individualized determination about whether it can reasonably accommodate those restrictions under the ADAAA. Thus, an employer must:
 - Evaluate the substance of those restrictions;
 - Evaluate the duration of those restrictions;
 - Evaluate the nature of the employee's individual job; and
 - Discuss those limitations with the employee by using the ADAAA "Interactive Process."
- It is possible that those restrictions cannot be accommodated, but by having a rigid, inflexible policy in place that prevents the dialogue, the EEOC views the employer as failing to fulfill its obligation to engage in the ADAAA interactive process.



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THE BERMUDA TRIANGLE OF EMPLOYMENT LAW: JOB RESTORATION FEATURES

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JOB RESTORATION: ADAAA, FMLA, AND WORKERS' COMP

JOB RESTORATION/REINSTATEMENT:

- ADA:** Required reinstatement to previous job unless doing so would create an undue hardship on the employer.
- FMLA:** Required reinstatement to the same or an equivalent job. No undue hardship exception.
- Workers' Compensation:** No reinstatement rights under most state laws, except for retaliatory discharges.



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JOB RESTORATION: FMLA

- Under FMLA an employee is required to be restored to the job they previously held OR to an equivalent position with equivalent benefits and pay.
- Employer may refuse to allow employee to return from FMLA leave if employee is not physically able to perform the essential functions of the job.
- Fitness for duty can be required. Must notify on the Designation Notice.
 - Employee cannot be required to work restricted/restricted duty while on FMLA. However, it can be offered and does not count against FMLA.
- Other than for a full release with no limitations or restrictions, use the "interactive process" to determine what, if any, reasonable accommodations you may make so the employee can return to work.
 - Particularly important at the end of 12 weeks of FMLA Leave.

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INTERPLAY BETWEEN ADAAA, FMLA, AND WORKERS' COMP

REQUIREMENT TO R-T-W WITHOUT RESTRICTIONS

- By refusing to allow an employee to return to work with restrictions, an employer has failed to make an individualized determination about whether it can reasonably accommodate those restrictions under the ADAAA. Thus, an employer must:
 - Evaluate the substance of those restrictions;
 - Evaluate the duration of those restrictions;
 - Evaluate the nature of the employee's **individual** job; and
 - Discuss those limitations with the employee by using the ADAAA "Interactive Process."
- It is possible that those restrictions cannot be accommodated, but by having a rigid, inflexible policy in place that prevents the dialogue, the EEOC views the employer as failing to fulfill its obligation to engage in the ADAAA interactive process.



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JOB RESTORATION: FMLA

FMLA DESIGNATION NOTICE: Include these statements in your cover letter:

- "You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided"
- "A list of the essential functions of your position is/is not attached. If attached, the fitness-for-duty certification must address your ability to perform these functions."
- Include a well-written job description, and possibly a comprehensive ADAAA job assessment form

NOTE: Before returning the employee to work from an FMLA leave, the employer may not require the employee to:

- Obtain a second opinion from another physician; or
- See the employer's doctor, in lieu of seeing the employee's own treating physician, to work.

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JOB RESTORATION: ADAAA

- ADAAA requires an employee to be restored to the position previously held, unless the employer can show:
 - It would have been an undue hardship to leave the position open during the employee's leave; OR,
 - That the employee is no longer able to perform the **essential functions** of the job, even with an accommodation
- Employer may be required to restructure the employee's current job or reassign them to a vacant position if they can no longer perform the essential functions of the current job.
- Restricted/Transitional duty may be a reasonable accommodation if routinely provided for those on WC.


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JOB RESTORATION: ADAAA

- A fitness to return to work certification is permitted as long as the medical examination and inquiry is job related and necessary to determine whether the employee can perform the essential functions of the job, either with or without a reasonable accommodation.
- However, a fitness-for-duty certification may only be required if the employer reasonably believes:
 - An employee's present ability to perform essential job functions will be impaired by a medical condition; or
 - An employee poses a direct threat due to a medical condition.




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JOB RESTORATION: ADAAA

- Under the ADAAA, any Fitness for Duty examination must be limited to what is needed to assess the employee's ability to work.
 - The employer should ensure that the information requested relates only to the particular disability and the employee's specific job functions.
- Unlike the FMLA, however, an employer is not required to notify an employee that it will require a fitness-for-duty certification at the start of the leave.
 - It is, however, a good idea to do so.




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JOB RESTORATION: ADAAA

- The FMLA and ADAAA also differ in one other respect when it comes to fitness-for-duty examinations.
- The FMLA requires the employer to accept a fitness-for-duty certification from the employee's treating physician in all circumstances without resorting to a second or other opinion.
- However, in an ADAAA analysis, an employer may require an employee to be examined by a health care professional (HCP) picked by the employer.
 - An employer must believe, based on objective evidence, that the employee currently poses a direct threat.
 - If this is the case, the employer may choose an HCP with expertise as to the employee's specific condition to conduct the examination.
 - This HCP is tasked with providing a medical assessment allowing the employer to determine the effects of the condition on the employee's ability to perform the job.
 - The employer must pay for the cost of this examination. Additional guidance on this topic is available on the [EEOC's website](#).




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JOB RESTORATION: WORKERS' COMPENSATION

- When FMLA leave has been exhausted or does not apply, job restoration rights will depend upon state workers' compensation (WC) law, possible ADAAA accommodation and company policies.
- Some state WC laws do include a reinstatement or rehire preference provision, though many do not.
 - If state WC law does not require job restoration, and the employer is subject to the ADA, the employer may be required to make a reasonable accommodation of time off for the employee.
 - State disability discrimination laws may also require such accommodations
- Company policies and benefits plan documents also should be reviewed for information on personal leave benefits, seniority rights, benefit reinstatement, benefit accruals, and any additional return-to-work guidelines.
- A Fitness-for-Duty Certification may be and typically is required.

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THE BERMUDA TRIANGLE OF EMPLOYMENT LAW: COMMON QUESTIONS & ISSUES



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Be sure to check all information regarding Workers' Compensation for each state where you have employees.

1. Can an Employer Run FMLA Leave Concurrently With a WC Absence?

- Not only can an employer run FMLA leave concurrently with a workers' compensation absence, but it is also beneficial that they do.
- If an employer fails to designate an absence as FMLA leave, it may provide the employee with more leave than they would otherwise be entitled to.
 - For example, an employee is injured on the job and goes out and returns to work after three months, having received workers' compensation benefits during the entire absence. Four months later, the same employee goes out on unrelated FMLA leave to care for an ill parent. If the original leave was not designated as FMLA leave the employee may be allowed time in excess of the 12 weeks of FMLA.
 - Once an employee uses up his or her 12 weeks of FMLA leave, the employee's workers' compensation benefit status does not provide him or her with job protection, although it is possible that the employee may be entitled to more time under the ADAAA if the injury qualifies

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1. Can an Employer Run FMLA Leave Concurrently With a WC Absence?

- The EEOC has stated that additional time to recover is a reasonable accommodation, but it hasn't said exactly how much time is required.
- The EEOC has said that an employer cannot have an auto-terminate policy.
 - An employer cannot give an employee a specified maximum period of leave, even if it is more than the required 12 weeks under FMLA, and if the employee does not return by that date, they are automatically terminated.
 - Rather, if an employee has exhausted his or her FMLA leave or was ineligible for FMLA leave, the employer **needs to engage in the interactive process with the employee and find out if there are any accommodations the employee needs to return to work, including additional leave time.**


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1. Can an Employer Run FMLA Leave Concurrently With a WC Absence?

- Under most state's laws, the employer is not required to continue the employee's benefits while receiving workers' compensation benefits.
- **BUT** if workers' compensation is running concurrently with FMLA, the employer is required to continue to provide benefits at the same level prior to leave.



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2. Can an Employer Exhaust Paid Leave While an Employee Is Receiving WC Benefits and on FMLA Leave?

- The FMLA does not allow an employer to exhaust/substitute paid leave while an employee is receiving workers' compensation payments.
 - But, an employer and employee can agree (should be in writing) to use paid leave to supplement workers' compensation payments since workers' compensation generally only provides a percentage of the employee's salary.
 - The employer and employee can agree to supplement the PTO benefits payments to 100% of the employee's regular wages.
 - Since many workers' compensation plans do not start payment until one to two weeks after an injury, assuming an employer's policies allow it, an employer may be able to require the employee to use accrued paid leave until workers' compensation benefits kick in.

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2. Can an Employer Exhaust Paid Leave While an Employee Is Receiving WC Benefits and on FMLA Leave?

- The benefit to making an employee use accrued paid leave when out on FMLA or in a workers' compensation waiting period is that the worker cannot come back from leave and then take paid time off.
 - For example, a worker goes out for 12 weeks and receives workers' compensation benefits and takes FMLA leave which run concurrently. An employer cannot require the employee to exhaust accrued paid leave during this period. The employee will come back after 12 weeks and the accrued paid leave is still intact.
 - Three months later the employee is hurt in a hunting accident (not work related). The employee has no more FMLA leave, but the employer will most likely be required to accommodate the employee under the ADAAA for a certain period of time if the injury qualifies.
 - At that point the employer can require the employee to exhaust accrued paid leave for the time he or she is out.

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3. Can an Employer Contact a Health Care Provider Regarding Medical Documentation During a WC, FMLA, or ADAAA Absence?

- In many circumstances an employer may have direct contact with an employee's health care provider in the manner in which the workers' compensation statute provides, as opposed to the FMLA, which allows for more limited interaction. The ADAAA only allows job-related questions consistent with business necessity.
- The ADAAA & FMLA both allow for certification of fitness-for-duty, but workers' compensation generally allows for medical inquiries relating to all aspects of the employee's injury, such as history, treatment prognosis, etc.
- The FMLA provides the least access to medical information, whereas workers' compensation statutes generally provide the most access to medical information (though employers should check their local workers' compensation law to ensure compliance).

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3. Can an Employer Contact a Health Care Provider Regarding Medical Documentation During a WC, FMLA, or ADAAA Absence?

- The only inquiry that can be made under the FMLA is whether the employee has a "serious health condition" that prevents performance of essential job functions.
 - Under the FMLA you can require a doctor's certification of a serious health condition.
 - You can also require reasonable documentation of family relationship for leave.
 - Under the FMLA you cannot require an exam or ask questions about previous family leave taken or prior serious health conditions before the offering of a job.
 - Under the FMLA you can also require a second certification at employer's expense. If you are running FMLA concurrently with workers' compensation benefits, you will not be limited by the FMLA.

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3. Can an Employer Contact a Health Care Provider Regarding Medical Documentation During a WC, FMLA, or ADAAA Absence?

- Under the ADAAA you can require a medical examination and obtain medical information after a conditional offer of employment is made.
- The medical inquiries made under the ADAAA are allowed as long as they are "job related" and "consistent with business necessity."
- Once again, where and ADAAA absence is running concurrently with workers' compensation benefits, you will not be limited by the ADA.

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4. What Happens to WC Benefits or ADAAA Protections if an Employee Turns Down Restricted Duty While on FMLA Leave?

- An employee has an absolute right to decline a restricted/limited duty job while on FMLA leave. The employee does not have the same right under workers' compensation or the ADAAA.
- If an employee's health care provider for the workers' compensation injury certifies that an employee is able to return to a restricted/transitional duty position, but the employee declines the employer's offer of restricted/transitional duty, the employee risks losing workers' compensation benefits (*Check your State WC*).
 - A worker who turns down a reasonable accommodation, risks a loss of job protection under the ADAAA.
 - When an employee declines restricted/transitional duty, the employee still remains on unpaid FMLA leave until the FMLA entitlement runs out. At the date the workers' compensation benefits ends, the employee may elect, or the employer may require the use of accrued unpaid leave or PTO benefits.

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4. What Happens to WC Benefits or ADAAA Protections if an Employee Turns Down Restricted Duty While on FMLA Leave?

- With regard to the ADAAA, in most instances the employer needs to offer restricted/transitional duty if it is a reasonable accommodation and does not create an undue hardship on the employer.
- Employer should stay away from implementing blanket policies which indicate that no restricted/transitional duty is permitted or offered, or that restricted/transitional duty is only offered for workplace injuries.
 - Such policies may violate an employer's duty under the ADAAA to engage in the interactive dialogue with an employee about whether restricted/transitional duty would be a reasonable accommodation under the particular facts and circumstances.
 - An employer can deny a request for reasonable accommodation under the ADAAA and provide the employee with an alternative reasonable accommodation that requires the employee to remain on the job. An employer can only do this if it is dealing solely with ADAAA requests and not FMLA leave.
- In addition, under the ADAAA, the employer may need to consider providing an employee with an additional leave of absence as a reasonable accommodation after the employee's FMLA leave entitlement ends because of a disability.

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5. Does an Employer Need to Continue Health Benefits if an Employee is on an Extended Leave of Absence Under the ADA?

- **No.**
- Unlike the FMLA, the ADAAA has no separate benefits continuation requirement.
- Depending on the language of an employer's particular health plan, employees out of work that are not on FMLA leave may become ineligible for benefits and instead have to continue their coverage under COBRA.
- The employer must carefully review the relevant plan document language, as well as any applicable state law, before initiating COBRA for employees on non-FMLA leaves.

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6. Is an FMLA "Serious Health Condition" the same as an ADAAA "Disability"?

- **No.**
- An ADAAA "disability" is an impairment that substantially limits one or more major life activities.
- An FMLA "Serious Health Condition" can be, but is not necessarily, an ADAAA "disability."
- An FMLA "Serious Health Condition" is an illness, injury, impairment, or physical or mental condition that requires either:
 - Inpatient care in a hospital or other health care facility; or
 - Continuing treatment by a health care provider, resulting in:
 - a period of incapacity of more than 3 consecutive days absence from work ...
 - plus any subsequent treatments or periods of incapacity relating to the same condition...

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7. Are all employees who are protected by the ADAAA also entitled to leave under the FMLA?

- **No.**
- The eligibility requirements under the two statutes are different, and the employee must separately qualify for coverage under each statute.
- Employees protected by the ADAAA must be a “qualified individual with a disability.”
- Employees “eligible” for FMLA leave must have a "Serious Health Condition".
- Unlike the FMLA, the ADAAA has no length of service requirements.

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8. If an individual requests time off for medical treatment, should the employer treat this as a request for FMLA leave and an ADAAA reasonable accommodation?

- **Maybe.** It depends.
- If an employee requests time off for a reason related or arguably related to a disability (e.g., “I need 10 weeks off to get treatment for a back problem”), the employer should consider this a request for ADAAA reasonable accommodation.
- If the request is for a condition that could qualify as a “serious health condition” (construe this liberally!), then FMLA paperwork should also be given to the employee.

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9. As an alternative to a leave of absence, may an employer offer an effective reasonable accommodation that will enable an employee to continue working?

- **Maybe.** It depends.
- An employer may offer an employee a reasonable accommodation other than leave, as long as it is effective.
- However, if the individual is “eligible” for leave under the FMLA and has a “serious health condition” (SHC) that prevents her from performing an essential job function, she has the right to take a leave of absence up to 12 workweeks (assuming the presence of an appropriate FMLA certification), even if she could continue working with an effective reasonable accommodation (although presumably there will be intermittent LOAs based on a SHC).

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10. Does a WC occupational injury always result in an ADAAA disability?

- **No.** It depends.
- Again, look to the statutory guidance of the ADAAA.
- Does the employee have an impairment that substantially limits a major life activity?
- If the injury results in a present condition that qualifies as a disability, employers are required to make reasonable accommodation.

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11. Is there a conflict between the FMLA provision allowing employers to ask for certification that an employee has an SHC and ADAAA restrictions on disability-related inquiries of employees?

- **No.**
- When an employee requests leave under the FMLA for a Serious Health Condition (“SHC”), employers do not violate the ADAAA by asking for the information specified in the FMLA certification form.
- The FMLA form only requests information relating to the particular SHC, as defined in the FMLA, for which the employee is seeking leave.

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12. What are an employer’s rights and obligations under the three statutes in situations involving restricted/transitional duty assignments?

- Assuming a particular work-related injury causes a condition that qualifies as a disability, under the ADAAA, an employer may provide an accommodation that requires the employee to remain on the job instead of or in addition to providing leave.
- However, if an employee is FMLA eligible, the employee can reject the restricted/transitional duty work, and his/her leave request must be granted.
- If an employee is offered and rejects restricted/transitional duty work, he/she generally will not receive “temporary total disability” benefits under workers’ comp.
- They do, however, have a 15-day grace period (*check your state statute*) to try out a restricted/transitional duty position to see whether he/she can actually perform the duties of that temporary position.

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13. Does the FMLA’s limit of 12 workweeks of leave in a 12-month period mean the ADAAA also limits employees to 12 weeks of leave per year?

- **No.**
- An otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship on the operation of the employer’s business.
- The EEOC has said there can be no “bright line” cut off.

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14. How do ADAAA and the FMLA requirements compare regarding intermittent or reduced schedule leave?

- Under the ADAAA, a qualified individual with a disability may work part-time in his current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer.
 - If (or when) reduced hours create an unreasonable hardship in the current position, the employer must see if there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without unreasonable hardship while working a reduced schedule.
 - If no equivalent position, look for a vacant position at a lower level.
- Under the FMLA, employers may require employees to transfer temporarily to an available position with equivalent pay and benefits if needed to better accommodate intermittent leave.

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15. What are the employee's reinstatement rights under the ADAAA, the FMLA and Workers' Comp?

- Under the **ADAAA**, the employee is entitled to return to the same job unless
 - the employer demonstrates that holding the job open would impose undue hardship, or
 - that the employee can no longer perform the essential functions of that job, with or without a reasonable accommodation.
- Under the **FMLA** (with a few minor exceptions), an employee must be reinstated to the same position or to an equivalent position.
- Under **Workers' Comp**, there is no automatic right of return, but it is usually of benefit to get the employee working at their original job as quickly as possible and reduce lost wage payments.

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16. What Employment Policies Should We Have in Place for Workers Comp?

- **WORKERS COMPENSATION POLICY** – *Should Include:*
 - Initial selection of medical provider
 - PTO use for 7 day waiting period
 - Use of leave to supplement WC payments, or to pay for employee share of benefit premiums
 - Post-accident drug and alcohol screening
- **Fitness for Duty Policy** – *Should Include:*
 - Fitness for Duty exam for assessment, and/or return-to-work
 - Selection of medical provider and payment for cost
- **Accident/Injury Reporting Policy** – *Should Include:*
 - Requirements for employee to report accident or injury
 - Requirements for employee to complete documentation
- **Drug-Free Workplace Policy** - *Should Include:*
 - Current Post-Accident/Incident Drug & Alcohol Testing Language
 - Testing Protocols for CDL, CID, or other covered employees

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16. What Percentage of an Employee's Wage is Paid by Workers Compensation?

CHECK IN YOUR STATE!

- **New Mexico:**
 - Compensation is 66 2/3 percent of the injured New Mexico worker's wage, up to the maximum allowable amount. Minimum weekly payment is \$36 or the workers actual wage if it is less.
 - NOTE – the income from WC is tax-exempt
 - Maximum weekly payment is 100 percent of the New Mexico state average weekly wage or \$669.21. Maximum number of payments is limited only to the time the disability lasts.
 - If you are doing a "top-off," be sure to take the tax effect into account. If you inadvertently pay more than the 100% to the employee, the workers comp benefit may be reduced accordingly.

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Be sure to check all information regarding Workers' Compensation for each state where you have employees.

16. What Percentage of an Employee's Wage is Paid by Workers Compensation?

CHECK IN YOUR STATE!

- **CALIFORNIA:**
 - In California, if you are injured on the job, you are entitled to receive 66 2/3 of your pretax gross wage. This is set by state law and also has a maximum allowable amount.
 - Your average weekly wage is the pre-tax gross amount that you were earning at the time of the injury, including overtime, the market value of job perks, and wages from multiple jobs. (Cal. Labor Code §§ 4453(c)(2), 4454, 4653 (2020).)
 - Employees may also be entitled to **permanent disability benefits**
 - Employees may also be entitled to a **Supplemental Job Displacement Benefit**

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THE BERMUDA TRIANGLE OF EMPLOYMENT LAW: SUMMARY AND TAKEAWAYS



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Be sure to check all information regarding Workers' Compensation for each state where you have employees.

SUMMARY AND TAKEAWAYS

- **Carefully Evaluate Cases for Applicable Leave Laws** - It is important to recognize and evaluate the interaction of the ADAAA, FMLA, and Workers' Compensation Laws because most absences are related to the illness of employees or their family members and one, both, or all three laws may be involved.
- **Legal Compliance** - Employers have legal responsibilities to comply with these laws and face significant violations for non-compliance.
- **Employee Rights** - Employers have ethical and moral responsibilities to assure employees receive the benefits and protections these laws provide.
- **Consider Other Laws** - While the Bermuda Triangle frequently comes up in the workplace, there may be other and often concurrent employment-related obligations that an employer may have, such as under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Fair Labor Standards Act (FLSA), COBRA, and more.

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ADA & ADAAA	<ul style="list-style-type: none"> • No specific limit on the amount of leave (reasonable accommodation unless an undue hardship). • Cannot discriminate with respect to provision of benefits. • Required reinstatement to previous job unless an undue hardship due to additional accommodations needed.
FMLA	<ul style="list-style-type: none"> • 12 weeks of leave in defined 12 month period. • Health care coverage continued; other benefit continuation as determined by policy for provision of such when employee on other forms of leave. • Required reinstatement to the same or an equivalent job (unless limited exceptions apply).
Workers' Compensation	<ul style="list-style-type: none"> • No specific limit on amount of leave. • Not required to continue benefits (but watch for FMLA coverage). • No reinstatement requirements under most state laws (but watch for retaliatory discharge).

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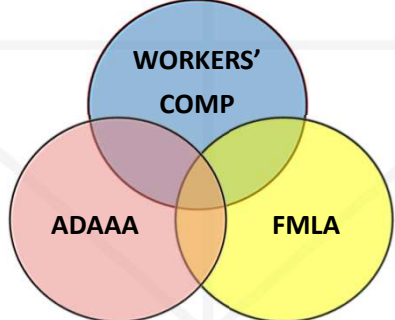
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SUMMARY AND TAKEAWAYS

Important areas of interplay between the three laws:

1. Employer Coverage
2. Employee Eligibility
3. Length of Leave
4. Medical Documentation
5. Restricted or Transitional Duty
6. Fitness-to-Return-to-Work Certification
7. Benefits While on Leave
8. Reinstatement



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SUMMARY AND TAKEAWAYS

1. Evaluate situation from all angles, considering FMLA, ADAAA and WC.
2. No bright line rules/policies – critical individualized analysis.
3. Engage in and skillfully document FMLA, ADAAA, WC efforts.
4. Get creative with accommodations and follow through.
5. Avoid saying “we don’t do that” when approached with a leave or accommodation question.
6. Communicate with employees at the end of their leaves before many ANY final decisions.

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SUMMARY AND TAKEAWAYS

TEN POINTS. To make your way through the ADA/WC/FMLA Bermuda Triangle, consider these ten points:

1. If the workers’ compensation leave extends beyond three days, initiate the FMLA leave process for eligible employees.
 - This is a critical point because employers cannot go back and retroactively apply FMLA.
 - The leave must be designated up front by the employer and proper FMLA forms must be completed.
 - FMLA leave can and should run concurrently with Workers’ Compensation.
 - Otherwise, you may find yourself granting an FMLA leave on top of previous leave. (This is called "leave-stacking" and you want to avoid it at all costs.)
2. Your obligation under ADA to reasonably accommodate an injured worker continues throughout the claim process and family or medical leave.

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SUMMARY AND TAKEAWAYS

TEN POINTS. To make your way through the ADA/WC/FMLA Bermuda Triangle, consider these ten points:

3. Decisions regarding the return to work and “transitional/restricted/light duty” assignments for injured workers must be made with an understanding of ADA and FMLA obligations.
4. Restricting light-duty positions to occupationally injured employees who return to work could result in an ADA violation.
5. All injured workers are not covered by ADA; they must first meet the definition of a qualified person with a disability.
6. Negative attitudes toward injured workers can create the perception of a disability that, in turn, can create an ADA liability.
7. All employment-related decisions about an individual with a disability must be made case by case. "Blanket" return-to-work policies are not acceptable.

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SUMMARY AND TAKEAWAYS

TEN POINTS. To make your way through the ADA/WC/FMLA Bermuda Triangle, consider these ten points:

8. Not allowing employees to return to work until they are 100 percent recovered ("full release") could be viewed as failure to reasonably accommodate under ADA.
9. Consider bringing an injured employee back to work on a Thursday, so they ease back into work with only two days before the weekend. This can alleviate situations where they revert back to collecting workers’ compensation because they cannot work a full workweek.
10. Designate someone in your company (typically, a human resources representative) to keep the lines of communication open with employees who are out on FMLA and WC leaves. Litigation often stems from a failure to communicate with employees i.e., if they feel forgotten or mistreated and become angry.


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SUMMARY AND TAKEAWAYS

- When in Doubt, Ask Your HR Advisor or Employment Law Attorney
- Don't Get Caught Up in the Bermuda Triangle.....



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THE BERMUDA TRIANGLE OF EMPLOYMENT LAW: BERMUDA BRAINBUSTERS

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BERMUDA BRAIN BUSTERS

No. 1: FMLA leave can run _____ with workers' comp leave.

- A. Consecutively
- B. Conformity
- C. Concurrently
- D. Continuously

- **ANSWER:** C. They can run concurrently, and employers should allow them to run concurrently so the highly technical FMLA restrictions and obligations are out of the way as early as possible.

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BERMUDA BRAIN BUSTERS

No. 2: Molly has worked for her company for 11 months and needs leave for 8 weeks for a temporary medical condition that will prevent her from working. After engaging in the ADA interactive process, she receives leave as an accommodation and is told that it will transition to FMLA at one year of employment, as she has already met the hour requirement. Following Molly's leave, what requirement is her employer expected to follow?

- A. Return Molly to any position with a current vacancy.
- B. Return Molly to the same position or an equivalent position.
- C. Return Molly to the same position, absent any undue hardship on the Company.
- D. The Company has no obligation to return Molly to work.

- **ANSWER:** B. The FMLA regulations apply here.

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BERMUDA BRAIN BUSTERS

No. 3: Jack, an FMLA eligible employee, has a WC injury that results in a permanent condition, which qualifies as a disability under the ADA. Jack submits fitness for duty (FFD) documentation that he cannot return to his previous position due to his restrictions and limitations. What happens to Jack now that it's determined he can't return to his old job?

- A. Jack will be terminated - he is unable to return to work.
- B. The interactive process should be engaged to assess reassignment as a reasonable accommodation.
- C. Jack can remain on temporary modified duty (TMD) as a long-term accommodation.
- D. None of the above.

- **ANSWER: C.** The ADA interactive discussion concerning possible reinstatement drives the decision here.

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BERMUDA BRAIN BUSTERS

No. 4: Rachel is receiving leave as an accommodation for a mental health disorder. She hasn't been with the company long enough, so she isn't eligible for FMLA. She contacts HR and asks what will happen to her health insurance and other benefits while she is out. HR tells her ...

- A. Only employees under FMLA continue to receive benefits.
- B. She will continue to receive benefits but only if she has enough paid leave time accrued to cover lost time.
- C. She continues to receive her benefits while on leave.
- D. It depends ... But on what?

- **ANSWER: D.** It depends in part on company policy and past practice.

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BERMUDA BRAIN BUSTERS

No. 5: Dan is returning to work after being on block FMLA for 8 weeks due to depression. He submits a "Fitness to Return" (FTR) stating he needs to attend weekly appointments for 1 hour/day. How should Dan's FTR be handled?

- A. Engage in the interactive process to determine if there's an alternative to Dan attending his appointments – he's missed a lot of time already.
- B. Dan has 4 weeks remaining of FMLA. He should be transitioned to intermittent FMLA for his appointments. If his FMLA exhausts, engage in the interactive process to assess accommodation possibilities, including leave.
- C. Mandate Dan's appointments be with the internal EAP provider, so he doesn't have to miss too much time.
- D. All of the above.

- **ANSWER: B.**

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BERMUDA BRAIN BUSTERS

No. 6: Medical documentation received for ADA accommodations can also be used for assessing and designating FMLA.

- A. **Correct.** Medical documentation is all the same – there's no need to duplicate paperwork.
- B. **Incorrect.** The Department of Labor has different requirements for determining FMLA eligibility and documentation for accommodations may not be sufficient.

- **ANSWER: B.**

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BERMUDA BRAIN BUSTERS

No. 7: Ashley has been employed with the company for four months. She recently learned she is diabetic and will require several appointments over the next few months to establish an appropriate treatment regimen. You should:

- A. Tell Ashley her appointments will have to fall outside of work hours because she isn't covered under FMLA and hasn't accrued enough time to miss work.
- B. Take Ashley at her word; don't request documentation and allow her to miss work whenever needed.
- C. Engage in the interactive process to assess intermittent leave as an accommodation and encourage Ashley to discuss with her provider additional accommodations that may be effective for her.

• **ANSWER:** C. Anything else?

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BERMUDA BRAIN BUSTERS

No. 8: Alex has been with the company for 4 years and sustained a concussion at work. After taking 2 weeks to recover, his provider releases him to temporary modified duty, working 4 hours/day, 3 days/week for the next month, and will then re-evaluate. You're able to accommodate the TMD but Alex declines, stating he doesn't agree he can work yet.

- A. Inform Alex of his rights to take leave under FMLA and that he can refuse TMD, but that it might impact his workers' comp benefits.
- B. Tell Alex that the Workers' Comp provider is the one who makes the decisions, and he has to take the TMD in order to not be terminated.
- C. Allow Alex to take his leave but terminate him once it exhausts for refusing to work.

• **ANSWER:** A.

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BERMUDA BRAIN BUSTERS

No. 9: Jason has been out of work under FMLA for cancer treatment. He is nearing leave exhaustion and provides updated medical documentation stating he will need to be out for 6 more weeks and can then return to full duty. What steps should be taken?

- A. Thank Jason for the update and terminate his employment at the end of his 12 weeks of FMLA leave.
- B. Tell Jason he has to return to work before the end of his FMLA or you cannot guarantee he will have a job.
- C. Engage in the interactive process to assess leave as a reasonable accommodation.

• **ANSWER:** C.

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BERMUDA BRAIN BUSTERS

No. 10: When providing temporary modified duty (TMD) for an occupational injury, it's best to do the following:

- A. Allow the employee to tell you what duties they can do – they know the injury and their abilities best.
- B. Establish a TMD based on the work restrictions from the WC medical provider and include a specific duration for the length of time the TMD will be provided.
- C. Don't offer TMD regardless of the recommendations – why risk having the employee injure themselves further, resulting in a more serious workers' compensation claim?

• **ANSWER:** B.

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BERMUDA BRAIN BUSTERS

No. 11: Sarah, who has been with her company for 2 years, broke her wrist after slipping on ice at work. She is going to require surgery and will be out for 4 weeks. What course of action should be taken following Sarah's injury?

- A. Have Sarah file a Workers' Comp claim.
- B. Tell Sarah that she can remain out of work on FMLA, but there's no need to file a claim because she has health insurance to cover her injury.
- C. File a Workers' Comp claim and follow FMLA guidelines to designate Sarah for block leave under FMLA.

• **ANSWER:** C.

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BERMUDA BRAIN BUSTERS

12. If an employer offers "make-work" light duty to employees with workers' comp injuries or illnesses, does it have to do the same for employees with non-work-related ADA disabilities?

- A. No, because people who get hurt on the job deserve more favorable treatment from the employer than people who don't.
- B. No, because "make-work" light duty is provided mainly to keep workers' comp premiums low by minimizing the benefit that has to be paid. That is not a concern with non-work-related ADA disabilities.
- C. Yes, as long as the employee is in good standing.
- D. Yes. The employer doesn't have to offer "make-work" light duty, but if it does, then it would be required to offer it to employees with ADA disabilities on the same basis.

• **ANSWER:** D. For this reason, it's not a good idea to allow employees with workers' comp injuries or illnesses to be on light duty indefinitely.

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BERMUDA BRAIN BUSTERS

13. Laura was injured on the job, and she is eligible for FMLA leave. You find an appropriate light duty position that is within her restrictions and has been approved by her doctor. When the position is offered to Laura, she says she doesn't want to take it and would rather go out on FMLA leave instead. What is your recourse, if any?

- A. Fire Laura for refusing an appropriate light duty position.
- B. Allow Laura to take FMLA leave, but then apply for her workers' comp benefits to be cut off because she refused an appropriate light duty position.
- C. Since Laura refused an appropriate light duty position, let her go out on leave, but count each day against her under the attendance policy, and terminate her when she reaches the limit.
- D. Nothing. You have no recourse in this situation.

• **ANSWER:** B. Laura has an absolute right to take FMLA leave, but you still have the right to at least try to get her workers' comp benefits cut off. (In real life, I'd suggest telling Laura in advance that this is what is going to happen. It might encourage her to change her mind and take the light duty instead.)

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BERMUDA BRAIN BUSTERS

14. Danny makes bicycle deliveries. At an intersection, a car ran a red light and hit Danny. Danny was in the hospital for a month, and he's been continuing to recuperate at home for the past two weeks. It appears that his mobility will be permanently impaired. You just received a note from Danny's doctor saying that Danny needs to stay out on medical leave for three more months (total of 4 1/2 months), and then he will be able to return to full duty with the accommodation of a recumbent bicycle. What do you do?

- A. Terminate Danny's employment because he will not be able to return to work at the end of his 12-week FMLA leave period.
- B. Let Danny stay on FMLA/workers' comp leave until he hits 12 weeks, and then charge each subsequent absence against him under your attendance policy until he gets enough occurrences for termination. Then terminate his employment.
- C. Call Danny, tell him you got the doctor's note, and say, "See you in three months! Your recumbent bike will be waiting! Luv ya!"
- D. Permanently replace Danny with an employee who can ride a regular bike.

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BERMUDA BRAIN BUSTERS

14. Danny makes bicycle deliveries. At an intersection, a car ran a red light and hit Danny ...

ANSWER: C, although employers can legally omit the "Luv ya!" part.

- The Equal Employment Opportunity Commission says that employers are generally required to allow employees with disabilities to take some "extra leave" as a reasonable accommodation under the ADA.
- Danny needs six weeks in addition to his 12 weeks of FMLA leave, and his doctor has given you a definite return-to-work date. Under these circumstances, you would almost certainly be required to let him have an extra six weeks of job-protected leave, and to allow him to return with the reasonable accommodation of a different type of bicycle, assuming there are no safety or efficiency issues.

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BERMUDA BRAIN BUSTERS

15. When an FMLA-eligible employee has a work-related injury or illness that results in an ADA-qualifying disability, a good protocol for employers to follow is:

- Let the FMLA entitlement run until it is exhausted. Meanwhile, follow up as needed with your workers' comp carrier. When employee is ready to return to work (assuming he or she can't return to full duty), engage in the interactive process with the employee and be open to making reasonable accommodations.
- Let the workers' comp case control but let the FMLA time run concurrently. Do not allow the employee to return to work until he or she is 100 percent recovered. That way, no "interactive process" or "reasonable accommodation" will be necessary. If the employee cannot come back at 100 percent, administratively terminate employment.
- Throw up your hands in despair. Too many laws!
- Let the FMLA entitlement run until it is exhausted. Meanwhile, follow up as needed with your workers' comp carrier. When employee is ready to return to work (assuming he or she can't return to full duty), bring him or her back to work doing "make-work" light duty.

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BERMUDA BRAIN BUSTERS

15. When an FMLA-eligible employee has a work-related injury or illness that results in an ADA-qualifying disability, a good protocol for employers to follow is:

ANSWER: A. There is a big difference between "reasonable accommodation" and "make-work" light duty.


- Reasonable accommodation consists of adjustments to an actual job that you need to have performed, to allow an individual with a disability to perform that job.
- Make-work is just what the name implies. In the workers' compensation context, light duty often serves no purpose for the employer other than to keep premiums low, and perhaps to keep the employee active and engaged with the company during recovery.
- Reasonable accommodation should be offered for as long as necessary to allow the employee with a disability to perform the essential functions of the job. Make-work light duty doesn't have to be offered at all, much less on a permanent basis.

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Be sure to check all information regarding Workers' Compensation for each state where you have employees.

Disclaimer



DISCLAIMER: Please be advised that insurance coverage cannot be altered, bound, or cancelled by voicemail, email, facsimile, or online, and insurance coverage is not effective until confirmed in writing by a licensed agent. The materials contained herein do not establish a broker relationship with Poms & Associates Insurance Brokers and is provided for informational purposes only.

A representative of Poms & Associates Insurance Brokers can provide you with a personalized assessment. Please contact us at 818-449-9317.

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