



# Employment Law Update

## Navigating the Bermuda Triangle of FMLA, ADA, and Workers' Compensation Leave



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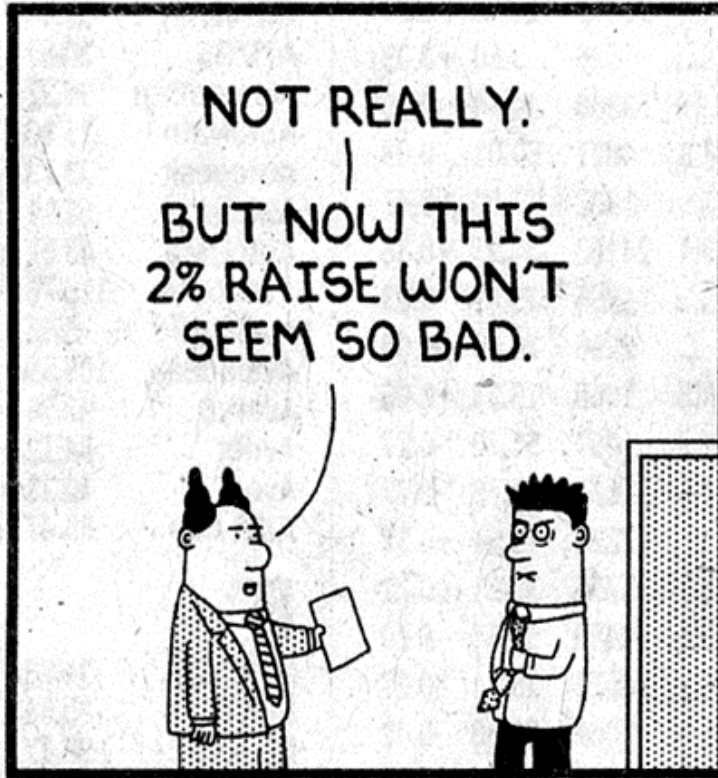
# Learning Objectives

- Understand when each law applies
- Understand the employers' obligations under each law
- Understand how the laws intersect
- Understand how to manage leave when one or more leave laws apply

# DILBERT



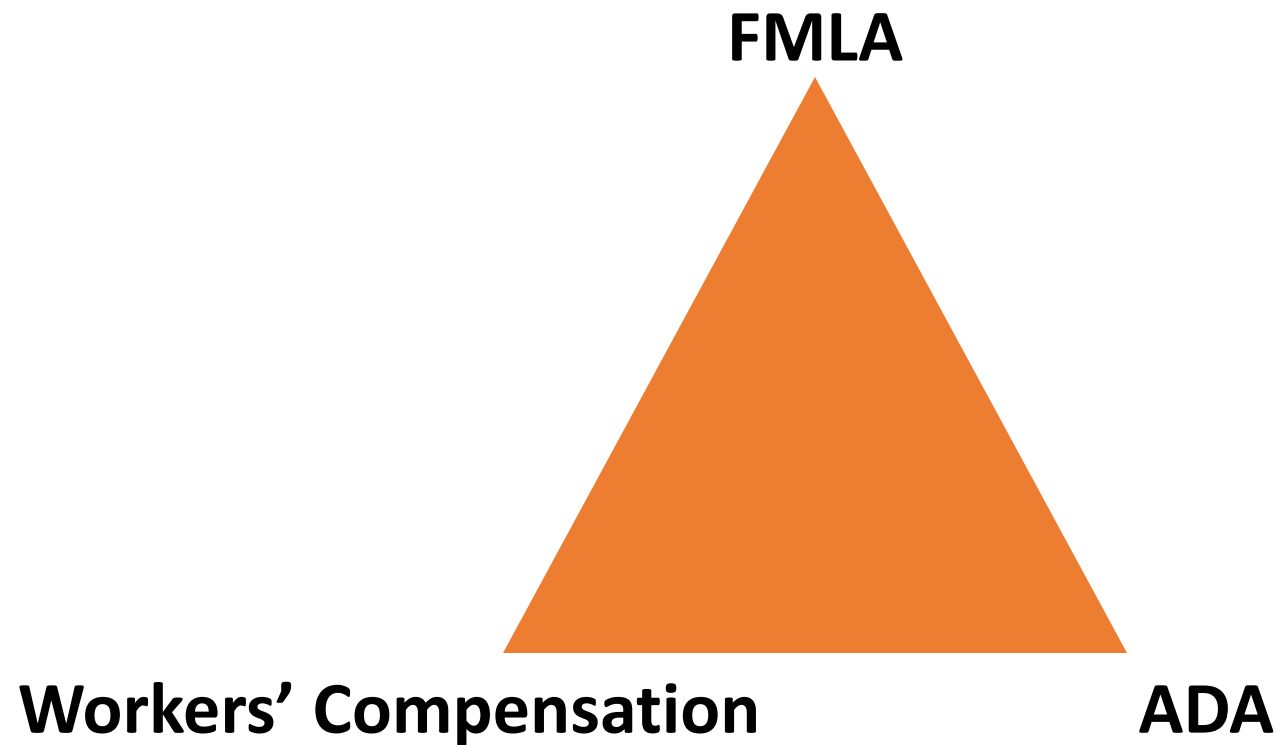
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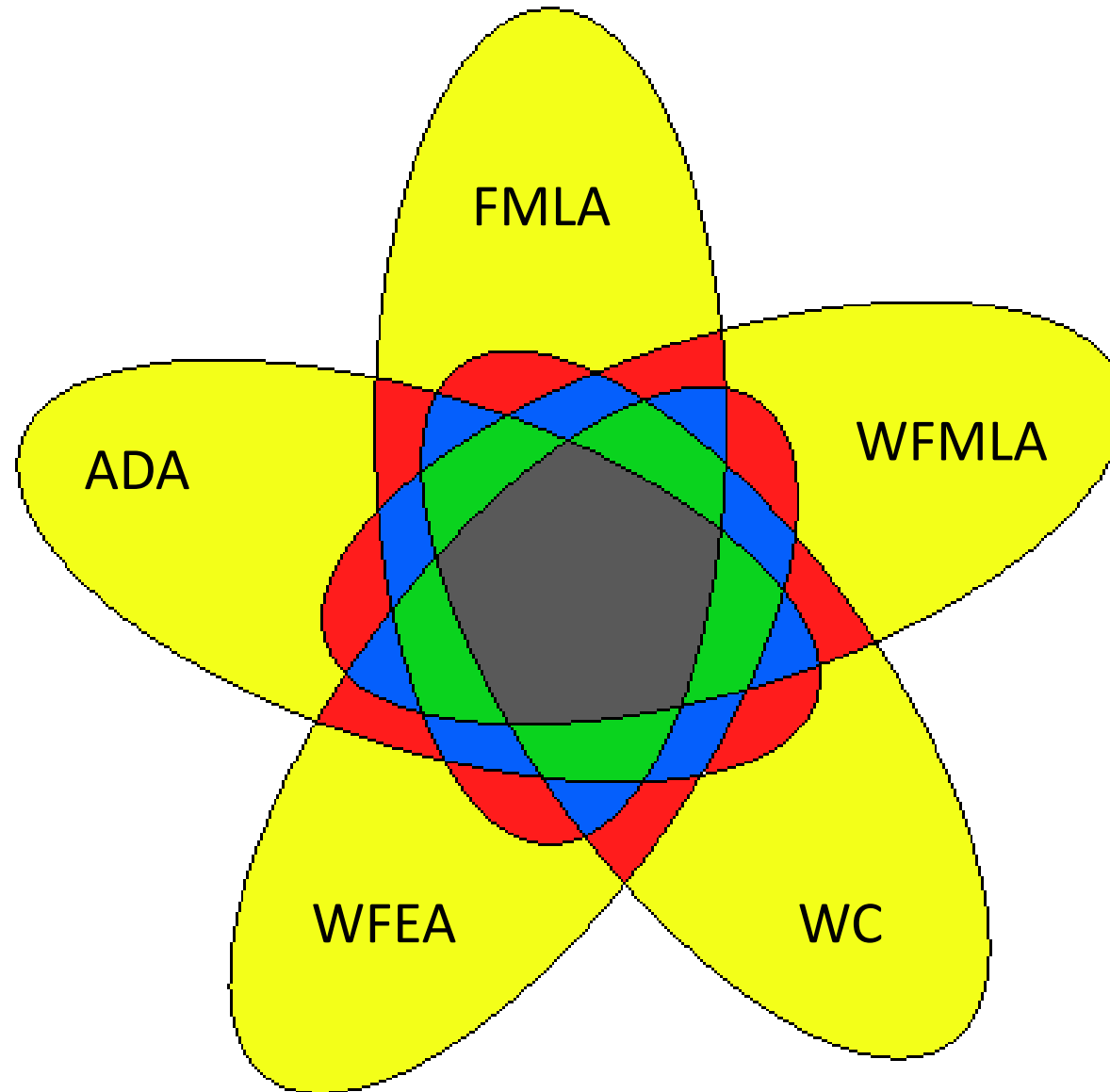


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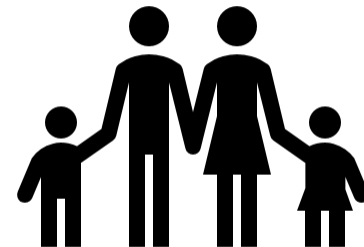
# The Bermuda Triangle





# FMLA Overview: Covered Employers

- Private-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer;
- Public agency, including a local, state, or Federal government agency, regardless of the number of employees it employs; or
- Public or private elementary or secondary school, regardless of the number of employees it employs.



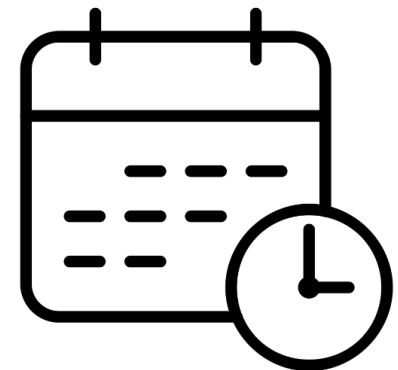
# FMLA Overview: Eligible Employees

## An eligible employee is one who:

- Works for a covered employer;
- Has worked for the employer for at least 12 months;
  - Work need not be consecutive
  - Count all periods of service over last 7 year
  - 7-year lookback period had limited exceptions, e.g. USERRA leave or CBA
- Has at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave; and
- Works at a location where the employer has at least 50 employees within 75 miles.
- Has a qualifying condition

# FMLA Overview: Leave Time Available for Qualifying Conditions

- 12 weeks of leave available for any one or a combination of the following reasons:
  - Birth, adoption, or foster care placement of a child and to care for a new child
  - To care for the serious health condition of a spouse, child, or parent
  - To care for the employee's own serious health condition
  - For a qualifying exigency
- 26 weeks of leave to deal with a covered servicemember's serious illness or injury

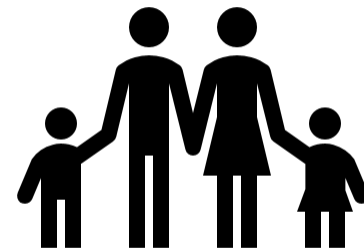


# FMLA Overview: Intermittent/Reduced Leave

- Intermittent leave – leave taken in separate blocks of time due to a single qualifying reason
- Reduced leave – reducing the usual number of working hours per workweek or workday
- Intermittent leave is available for leave due to a serious health condition, a qualifying exigency, and a servicemember's serious illness or injury
- For birth or placement of a child—employer consent required under federal law, but not Wisconsin

# FMLA Overview: Concurrent Leave

- State and federal FMLA leave time may be run concurrently.
- State and Federal FMLA may be run concurrent with a period of workers' compensation leave that meets the definition of a serious health condition.
- The ADA concepts of “reasonable accommodation” and “undue hardship” are irrelevant for state and federal FMLA purposes.



# State Leave Laws

- States with family medical leave laws
  - California, Connecticut, District of Columbia, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin
- States with paid family leave:
  - California, Colorado, Connecticut, District of Columbia, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington
- State law may be more generous
- Beware of other state leave laws, e.g.,
  - Iowa Civil Rights Act
  - Illinois Sick Leave Act
  - Paid Sick Leave



# ADA Overview

- Covers employers with 15+ employees
- Prohibits discrimination against employees with disabilities
- Disability:
  - Actual: Employee has a physical or mental impairment that substantially limits one or more major life activities
  - Regarded As: Is regarded as having such an impairment
  - Record Of: has a record of such an impairment



# ADA Overview

- No (concrete) limitation on leave time, but indefinite leave is generally held unreasonable
- No waiting period or minimum hours
- Retaliation prohibited
- State law typically provides similar protection



# Worker's Compensation Overview

- Creature of state law; federal law applies only to federal employees
- No fault system designed to compensate employees for injuries and illnesses that arise out of employment
- Provides benefits for medical treatment and wage loss
- Applies to most employers, even small ones
- No accommodation required
- No waiting period or minimum hours
- Retaliatory termination prohibited



# Intersecting Leave

- Documentation
- Substitution of leave
- Benefits
- Covered medical conditions
- Requesting leave
- Managing leave
- Light duty/temporary modified duty
- Return to work



# Documentation

- FMLA:
  - General notice (typically in employee handbook)
  - Eligibility & rights and responsibilities notice (WH-381)
  - Designation notice (WH-382)
  - Certification forms (WH-380-E; 380-F; 384, 385, 385-V)
  - Be mindful of time requirements
- ADA:
  - Medical inquiries only allowed where job-related and consistent with business necessity
  - Limited to how the disability affects the employee's ability to perform essential job functions where not readily apparent
- WC:
  - State required forms, e.g., Employer's First Report of Injury or Disease
- Each law has posting requirements

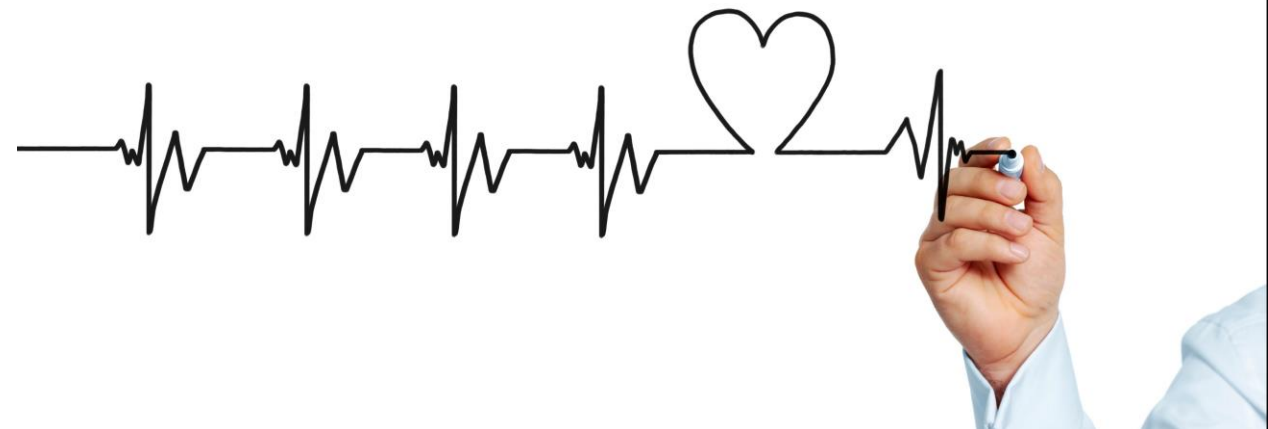
# Forced Substitution of Paid Leave

- FMLA: Permissible for periods of unpaid leave; by agreement for periods of paid leave
- WFMLA: Impermissible without employee approval
- ADA: Not addressed; more likely than not STD will apply
- WC: Paid leave applies, unless the employee refuses light duty



# Benefits

- FMLA: Health insurance coverage must continue.
- ADA: Continuation of benefits should be treated the same way the employer treats continuation for others on similar leave
- WC: Generally not required, unless FMLA is run concurrently



# Migraine Headaches Caused by Florescent Lighting at Work



# Employee Scenario: Migraine Mary

- Migraine Mary is an employee in the Company's accounting department.
- Mary has been diagnosed with severe migraines and mood swings caused by prolonged exposure to fluorescent lighting.



# Medical Conditions That Give Rise to Leave

- FMLA: Must show serious health condition of employee or family member.
- Workers' Compensation: Must show an injury that occurred during the course of employment **and** arose out of the employment.
- ADA: Must show a physical or mental impairment that substantially limits one or more major life activities.



# FMLA Serious Health Condition

- A serious health condition is, in general, an illness, impairment, or mental condition that involves either: (1) inpatient care or (2) continuing treatment by a healthcare provider
- Continuing Treatment: Three or more days of incapacity and:
  - (A) treatment two or more times within first 30 days or
  - (B) treatment on one occasion that results in a regimen of continued treatment
- Chronic Conditions: Require periodic treatment and continues over an extended period

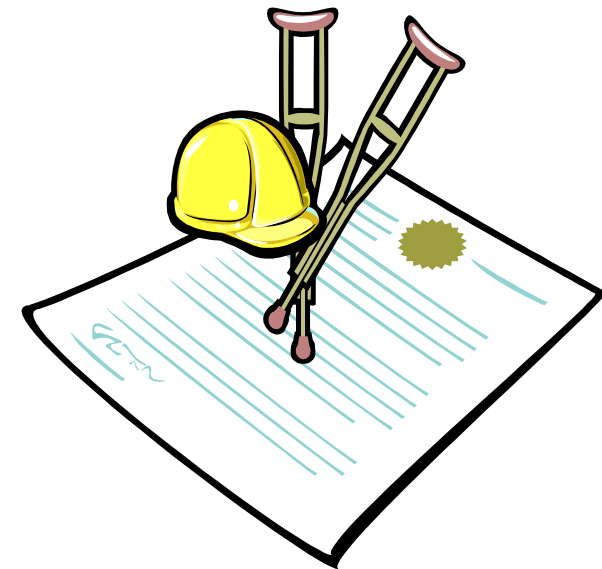


# ADA: New Meaning of Disability

- Effective January 1, 2009, the ADA was amended to increase the number of employees covered by the ADA.
- Major life activity was redefined as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, or communicating.
- Also “major bodily functions” – including immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

# ADA: New Meaning of Disability

- Episodic impairments and impairments in remission are disabilities if they would substantially limit a major life activity when active.
- Mitigating factors may not be considered.



# Employee Scenario: Migraine Mary

- Mary's absences and tardiness have been increasing. CFO Sarah approaches Migraine Mary about her absences and asks if everything is okay.
- Migraine Mary tells CFO Sarah that the fluorescent lights in her office are causing her to suffer severe migraine headaches and that, as a result, she will have to miss work from time to time with little to no notice possible.

# Requesting Leave of Absence

- FMLA:
  - Oral or written request for leave 30 days in advance, where possible
  - Employer may require FMLA certification, clarification, and second opinion
- Workers' Compensation:
  - Oral or written notice of injury within 45 days of injury
  - Employer may subpoena medical records and may require independent medical examination
- ADA:
  - Employers must engage in the interactive process if employee requests accommodation
  - Employers may require medical records showing nature, extent, and severity of medical condition

# Employee Scenario: Migraine Mary

- In September, Migraine Mary begins reporting every Friday that she is suffering from a severe migraine and is not able to come to work.



# Managing Employee Leave

- FMLA
  - Recertification allowed every 30 days, unless longer period identified by doctor
  - Recertification for change in circumstances
  - Recertification for fraud
- Workers' Compensation
  - Updates at every doctors appointment, physical therapy session, medication refill, etc
- ADA
  - As necessary to confirm disability and need for reasonable accommodation

***Run leave concurrently!***

# Managing Intermittent Leave

- FMLA
  - Granted in the shortest increment of leave allowed by the employer that is less than one hour
  - May seek recertification for new conditions and increase in frequency
  - Employee must make a reasonable effort to schedule treatment outside of work hours
  - Employer may temporarily transfer the employee's position
- Workers' Compensation
  - No intermittent leave required
- ADA
  - May require medical records for increased severity or frequency
  - Employer may choose reasonable accommodation, including schedule change or alteration of job duties

# Light Duty/Temporary Modified Duty

- FMLA
  - Light duty does not qualify for FMLA leave
- Workers' Compensation
  - Allowed, but not required
  - Establish in writing that it is temporary
  - Employee may reject; rejection may impact benefits
- ADA
  - No light duty requirement, unless the job can be permanent
  - If light duty is made available to employee who suffered work-related injuries, employers may have to make it available as a reasonable accommodation for disabled employees as well
  - Establish in writing that it is temporary

# Employee Scenario: Migraine Mary

- During her intermittent leave, Migraine Mary's work performance begins to suffer:
  - Migraine Mary missed mandatory meetings;
  - She missed typographical errors in the budget for the OGC office;
  - She oftentimes snaps at coworkers; and
  - She is never available when CFO Sarah needs her.



# Managing Employee Performance During Leave

- Each law prohibits retaliation (W.C. retaliation limited to termination)
- Performance should be managed without consideration of leave or medical condition
- Employer may enforce work rules and notification requirements
- Adverse actions that would have occurred regardless of leave may be taken
- ADA prohibits discrimination because of disability as well

# Employee Scenario: Migraine Mary

- On October 5, Migraine Mary trips and falls over chairs in the conference room while trying to attend a mandatory meeting, dislocating her knee.
- Migraine Mary submits a doctor's note indicating that she can return to work on January 30.





# Return to Work

- FMLA
  - An employee released to return to work, prior to the expiration of 12 weeks leave, must be returned to the same position or equivalent position with equivalent benefits, pay, and other terms and conditions of employment.
  - Exceptions where termination would have occurred had the employee not taken FMLA
  - No accommodation required
- Workers' Compensation
  - Varies by state. Typically, no requirement to return employee to work, but employer may have increased liability for the work-related injury
  - Cannot refuse to return because of injury or receipt of benefits
- ADA
  - Return to previous position unless doing so would cause undue hardship
  - Employers must make reasonable accommodations to return employee to job, including extended leave, job duty modification, transition to vacate position, coworker assistance, modified equipment, etc.

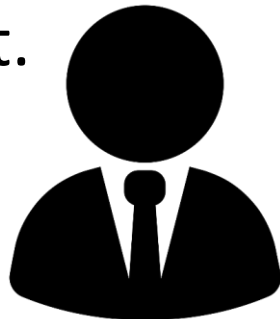


# Return to Work: Fitness for Duty

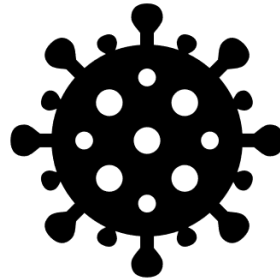
- FMLA
  - Fitness to return is optional
  - Employee needs to be notified of fitness to return requirement
- Workers' Compensation
  - Fitness to return typically required
- ADA
  - Fitness to return is optional
  - Consider using on a case-by-case basis where there is reason to believe the employee's ability to perform essential job functions will be limited

# ADA, EEOC, and Return to Work

- The EEOC is aggressively pursuing employers who terminate employees at the conclusion of medical leave.
- The ADA makes it very difficult to manage return to work and employee leave with consistency.
- Consider whether additional leave is a reasonable accommodation.
- Leave can be a reasonable accommodation. Indefinite leave is not.



# COVID-19



- COVID is not automatically a serious health condition or a disability.
- COVID can manifest itself in a manner that it becomes a serious health condition or a disability.
  - EEOC recently issued COVID-19 Technical Assistance Guidance
  - Disability: employee receives supplemental oxygen for breathing difficulties and has shortness of breath, associated fatigue, and other virus-related effects that last, or are expected to last, for several months
  - No disability: employee experiences congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort, which resolve within several weeks, but experiences no further symptoms or effects.
- COVID may be a compensable work injury.
  - Employee must have contracted COVID performing a service growing out of and incidental to employment.
- Employers should treat COVID-related leave in the same manner they treat other conditions.

## In Closing ...

- Each time an employee alerts the Company that the employee is suffering from a medical condition that effects the employee's ability to work, we should examine our requirements under the FMLA, Workers' Compensation, and the ADA.
- Where all three laws apply to an employee's medical condition, coordination and communication are essential to preventing unintended liability exposure.



# THANK YOU!



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