Breakout Sessions – Series 5

WORKERS’ COMPENSATION AND THE FMLA

PROPERLY INVESTIGATING AND HANDLING OCCUPATIONAL INJURIES

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I. Introduction

In order for an employer to monitor and assess claimed work injuries properly, which in turn helps the employer to ensure its compliance under any applicable law and to avoid potential abuse of its workers’ compensation program, the employer must understand the issues to look out for during investigation and the steps to take to determine compensability of the claim, requirements under any applicable workers’ compensation statute, and other employment obligations and opportunities that may exist under laws like the FMLA, the ADA, similar state statutes, and OSHA’s recordkeeping and reporting rules.

II. Notice of a Claimed Work Injury

Once an employer receives notice of a claimed work injury, most workers’ compensation statutes or programs require that the employer report the claimed injury and then determine (with its carrier, if it is insured) whether the employee is entitled to any workers’ compensation benefits.

A. Report of Accident

Generally, employers must keep a record of all reported injuries which its employees suffer or claim to have suffered in the course of their employment. Some states, as part of their workers’ compensation programs, also impose filing requirements when a claimed work injury results in missed time from work. Depending on the jurisdiction, a fine may be imposed against the employer if it fails to meet the filing requirement timely. OSHA’s rules impose additional reporting and recordkeeping obligations for certain work injuries, but it is important for employers to understand that OSHA recordkeeping and reporting obligations differ from workers’ compensation recording and reporting obligations.

B. Determining Whether the Reported Injury Is Compensable

The initial investigation of an alleged work-related injury is critical. The purpose of the investigation is to determine whether the reported work injury was caused by the employment, whether, if so, it is covered under the applicable workers’ compensation program, and whether the employee is entitled to benefits as a result. In many jurisdictions, if the employer determines an injury to be a compensable work injury causing the employee to rely on that determination, it is difficult for the employer later to change that determination if new information calls into question whether the injury should have been deemed compensable in the first place.

As such, an employer needs to ensure it is gathering all relevant information about the claimed injury, in order to make an accurate determination as to whether the claimed injury is compensable. To do this, the employer must understand the types of injuries covered by the applicable workers’ compensation program and whether any defenses may apply.

III. Relevant Issues to Determine Compensability of a Claimed Work Injury

In order to conduct the necessary investigation into a claimed work injury, an employer first must understand which employees and injuries are covered by the applicable workers’ compensation program.
A. Applicability of a Workers’ Compensation Program

Most, if not all, states mandate some type of workers’ compensation program in order for an employer to conduct business in that state. Many states set forth the statutory requirements for a workers’ compensation program. Employers purchase insurance to pay the benefits, and insurers process the claims. In some states, an employer can establish a self-funded program and utilize a third-party administrator to process claims. Other states have one funded program that all employers in the state must participate in, and still other states allow an employer to opt-out of the general workers’ compensation program altogether, as long as the employer establishes its own program that meets minimum requirements.

Regardless of the method for funding or processing claims, there are certain requirements that generally can be said to apply to all workers’ compensation programs. Understanding these requirements helps an employer to understand and manage its workers’ compensation obligations better.

1. Employee-Employer Relationship

The applicable workers’ compensation statute or program will likely include a definition of those employees who are eligible for benefits. Disputes arise especially where the injured person is argued to be an independent contractor, rather than an employee. And states’ definitions of independent contractor vary widely. If the facts do not support a finding that the injured person was an employee, then he or she is not entitled to benefits under the program for the claimed injury.

It is important for an employer also to understand that an individual can meet the requirements of being an employee for more than one employer. Those employees are considered to be engaged in dual employment. The simplest example of a dual employment situation involves the temporary staffing employee. Under some states’ workers’ compensation laws, the employee of a temporary staffing agency may be considered an employee of the agency, if that is the company that hired and pays wages to the employee. But that employee also may be considered an employee of the business that contracts with the temporary staffing agency to provide the temporary worker, if that company exerts sufficient control over the method with and manner in which the employee must perform the work.

Also in the workers’ compensation context, an employee of one company may be considered a “borrowed servant” or “loaned employee” to another company. For that situation to arise, the injury must be sustained while the non-employing company is exerting sufficient control over the manner in which the other company’s employee is performing the work. For example, if a construction company contracts with a crane company for use of its crane and crane operator, the crane operator may be considered a “borrowed servant” or “loaned employee” of the construction company if the construction company asserts sufficient control over the manner in which the crane operator performs the work and s/he suffers an injury.

Some states also impose a statutory obligation on a company to request a certificate of workers’ compensation insurance from any other company it contracts with to perform services. If the company fails to request a certificate of insurance and an employee of the contracted company is injured while performing the services, some statutes impose liability on the first company to cover the workers’ compensation benefits for the injured worker as if the worker were its employee.
Therefore, when an employer is evaluating whether an injured person falls under its workers’ compensation program, the employer must not limit its analysis to whether or not the person is on its roster of employees or even whether it pays the person’s wages. Instead, several other factors may need to be considered to determine whether the injured person is eligible for coverage under the workers’ compensation program.

2. **Was the injury “by accident”?**

When workers’ compensation statutes were first enacted, they required that the injury occurred “by an accident,” meaning that some event had to occur that caused the injury before it would be considered a compensable injury. Most states still include a requirement that a work injury must have occurred “by accident” in order to be compensable. Generally, this requirement simply means the injury was not intentional. This change developed as a result of more employees claiming work injuries from the cumulative effect of work activities, also known as repetitive trauma.

Therefore, when conducting an initial investigation, the employer should keep in mind that, if the injury was “intentional,” it is unlikely to meet the requirement of being an injury “by accident.”

3. **Was the injury caused by and during the course of the employment?**

It is generally not sufficient to show merely employment and an injury during the period of employment, but, instead, the claimant generally has the burden of proving that the injury had its origin in a risk connected with the employment and that it flowed from that source as a rational consequence. Sometimes these are referred to as the “arising out of and in the course of employment” tests. If the injury was caused by a risk personal to the employee, then the injury may not be compensable. For example, an employee who has a heart attack while working would have to prove that something about the work caused the heart attack to occur; otherwise, the heart attack would simply be due to a risk personal to the employee and would not be a compensable work injury.

An issue that can come up in this context is the compensability of an injury that results from horseplay, since horseplay is not considered a risk of the employment, but one personal in nature. But what if the employer was aware of the horseplay and allowed it? Similarly, when an injury occurs while the employee is engaged in an excursion or deviation from employment for the employee’s personal matters, the injury is not generally considered to have resulted from a risk of the employment.

Therefore, when conducting its initial investigation, an employer should keep in mind that, if the injury did not have its origin in a risk connected with the employee’s employment, was not a natural condition of the employment, or occurred while the employee was engaged in horseplay or a deviation from the employment, the injury very well may not be compensable.

B. **Special or Affirmative Defenses**

Some states codify affirmative or special defenses that, if proven by the employer, bar the employee from recovering any benefits for the claimed work injury or result in a reduction of benefits. For example, in many states, if the employer can prove the accident was caused by the employee’s intoxication, then the employee is not entitled to any benefits for the injury or is entitled only to limited benefits. In some states, if the employer can prove the injury occurred
while the employee was engaged in the commission of a crime or offense, including operating a motor vehicle in a reckless manner, the employee is not entitled to any benefits. In some states, proof that the employee failed to use a safety appliance or to follow a safety rule and that the failure resulted in the claimed injury will result in the disqualification of the employee from entitlement to any benefits.

It is important for the employer to know whether the applicable state’s workers’ compensation program has any special or affirmative defenses, so that the employer can ensure its investigation into a claimed work injury considers whether such a defense applies.

IV. Evidence to Gather in a Workers’ Compensation Investigation

During the investigation into a reported work injury, it is imperative that the employer conduct a thorough investigation to determine whether the injury is covered by the applicable workers’ compensation law or program and whether any special or affirmative defenses may apply. The scope of the investigation will depend on the type of accident that occurred, the injury sustained, and the area or location where the accident occurred. The following types of information or evidence may be needed for the employer to evaluate a claimed injury thoroughly and to determine whether it is compensable under the applicable workers’ compensation law or program.

A. Statements From Anyone With Knowledge of the Injury

Statements from the injured employee, co-workers, witnesses, and supervisors may be especially helpful in determining whether a claimed injury arose out of and in the course of the employment. For example, co-workers may be aware that the injured employee really sustained his injury outside of work or that the alleged injury is actually a pre-existing condition unrelated to the employee’s work.

These statements may also lead to proof of an affirmative defense. For example, a witness may have observed that the employee was not using the proper safety devices to perform his or her job where that failure caused the employee’s injury.

During the investigation, the employer should ensure that each statement is written and that it is signed by the person making it.

B. All Medical Records

The injured employee’s medical records may be crucial in determining whether the injury should be deemed compensable. For example, the medical records may show that the injured employee first sought treatment for the injury while off work and that s/he reported to the treating physician that the injury occurred while engaged in a hobby. The records also may show that immediately after the accident the employee had a high blood-alcohol content or another drug in his or her system. The employer may be able to use this information to support the affirmative defense that the employee’s injury was caused by his intoxication.

C. Diagrams, Drawings, and Photos of the Accident Scene

Diagrams, drawings, and photographs of the accident scene, particularly immediately after a claimed incident, before the scene is disturbed, can be especially helpful in establishing
whether the incident allegedly leading to the injury could have happened as described by the employee.

D. Information From Visiting and Inspecting the Accident Scene

A visual inspection of the accident scene, as well as any equipment involved in the accident, may provide valuable information regarding the cause of the incident allegedly leading to the claimed injury. For example, while inspecting the accident scene, the investigator may discover that the accident was caused by the injured employee failing to use a safety device. Alternatively, the investigator may discover that the accident could not have occurred at the time, at the place, or in the manner represented by the injured employee. The evidence from such an inspection also may establish an affirmative defense or prove that the injury was not caused by a risk of the employment.

After an inspection of the accident scene, the person investigating should prepare a written report that summarizes the inspection, evidence revealed in the inspection, and any conclusions drawn from the inspection.

E. Any Public Records or Other Accident Reports

The employer should obtain all public records and reports relating to the alleged injury, including any newspaper articles, phone recordings, videos, news broadcasts, death certificates, coroner’s reports, police and ambulance reports, and autopsy reports. These reports may contain references to intoxication, criminal offenses, statutory violations, and “horseplay” activities, which the injured employee was involved in at the time of the accident. These reports may also reveal that the cause of the injury was not work-related.

F. Use of a Private Investigator and Other Experts

In some cases, the use of a private investigator is either necessary or just wise to show that an alleged incident did not cause the claimed injury or that the actual injury sustained was not the one or as severe as the one claimed. Surveillance of the injured employee may be beneficial, especially when the employee is claiming disability as a result of the work injury, but the surveillance reveals s/he spends days doing things inconsistent with his claimed limitations – for instance, playing basketball, jogging, attending concerts, doing landscaping/lawn or construction work, or working at a different job. Hiring a private investigator to speak with neighbors, friends, or relatives of the injured employee also can be helpful, especially if those interviews disclose that, for example, a neighbor saw the employee injure his back while cleaning the gutters from atop a ladder at home.

The use of an engineer to recreate an accident also may be necessary or helpful in determining whether the accident could have occurred the employee claims or whether the alleged injury could have resulted from the claimed incident.

An investigation should not focus only on events at the time of the alleged incident or even before it. Helpful information also may be obtained when the investigation focuses on events that follow the alleged accident. For example, an investigator may discover from researching public police records that the day after the alleged back injury at work, the employee was involved in an automobile accident in which he more severely injured his back. Medical records can be the source of similarly helpful information.
V. Benefits Payable Under the Applicable Workers’ Compensation Program

A. Medical

Most workers’ compensation laws and programs provide that an injured employee is entitled to medical care to treat the work injury at least until the medical condition has reached maximum medical improvement or a healing plateau – that is, has gotten as good as it’s likely to get. Some states also require that the employer provide any on-going, non-curative palliative care needed to maintain the employee’s level of function once s/he has completed medical treatment for the work injury.

Some workers’ compensation laws and programs provide employees with the right to select their treating health care providers. Others reserve that right to employers. Still others provide for state-established panels from which employees have a right to choose their treating providers. And still others provide for a more blended approach, where one party selects the treating doctor initially but, if certain prescribed issues arise, the other party can make a change.

B. Disability Benefits

Usually following a work injury and during the treatment period, the injured employee is entitled to a portion of his or her average wages as a disability benefit if s/he is unable to work as a result of the injury. Many employers also have light duty return-to-work programs, especially for employees who suffer work injuries. These programs allow an employee to return to work in some capacity, which some medical experts consider a very important part of the recovery process. Many workers’ compensation laws and programs provide that, if an employer offers light duty work and the employee refuses it, disability benefits can be denied.

C. Permanency Benefits/Final Award

Once an employee’s injury has stabilized to a quiescent and apparently permanent state, but has resulted in restrictions, the employee is generally entitled to a benefit that is intended to compensate him or her for any permanent loss of function suffered as a result of the work injury. If the employee is unable to resume any reasonable type of employment as a result of his or her work injury, most states’ laws or programs also provide for a permanent total disability benefit.

VI. Employer Obligations and Opportunities Related to Work Injuries Under the FMLA

A. Covered Employers

The FMLA applies to any employer: 1) that is engaged in commerce or any industry or activity affecting commerce and 2) that employs fifty (50) or more employees each working day during twenty (20) or more calendar work weeks in the current or preceding calendar year. 29 U.S.C. §2611(4)(A)(i). In addition, the FMLA applies to all public agencies regardless of the number of employees. 29 C.F.R. §825.108(d). FMLA. Some states have their own “mini-FMLAs,” some of which track the federal FMLA but many of which do not.

B. Covered Employees

An employee is eligible for protection under the FMLA if two requirements are met. First, the employee must have worked for the employer from whom leave was requested at least 12
months. 29 U.S.C. §2611(2)(A). These 12 months do not have to be consecutive. 29 C.F.R. §825.110(b). Second, the employee must have worked for the employer from which the leave time has been requested for a minimum of 1,250 hours during the immediately-previous, 12-month period. 29 U.S.C. §2611(2)(A). Only hours actually worked count toward the 1,250 hour requirement. Therefore, vacation time, sick time, and periods of layoff do not count.

C. Does the work injury meet the requirements for a serious health condition?

Relevant to this paper, an employee protected under the FMLA is entitled to 12 work weeks of leave during any 12-month period for the employee’s own “serious health condition”, if the condition renders the employee unable to perform the functions of his or her job. 29 U.S.C. §2612(a)(1).

The FMLA defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves either 1) inpatient care in a hospital, hospice, or a residential medical care facility, or 2) continuing treatment by a health care provider. 29 U.S.C. §2611(11); 29 C.F.R. §825.114. The DOL regulations also provide that a serious health condition involving continuing treatment includes: a) being incapacitated for more than three consecutive full calendar days for the same condition; b) any period of incapacity for pregnancy or prenatal care; and c) any period of incapacity due to a chronic serious health condition or treatment for such a condition. 29 CFR § 825.115. In addition, to meet the “continuing treatment” requirement, an employee must: 1) receive treatment two times within 30 days of the first day of incapacity, unless extenuating circumstances exist; 2) see a health care provider within seven days of the first day of incapacity; and 3) visit the health care provider in person. One in-person visit to a health care provider and a course of prescribed medication thereafter also can qualify as “continuing treatment”.

D. Job and Benefit Protection While on Leave

The FMLA guarantees eligible employees the right to take up to twelve weeks of unpaid leave during any 12-month period for a serious health condition. 29 U.S.C. §2612(a). The employer must maintain a qualifying employee’s health benefits during the leave according to the same terms as if the employee were not on leave. 29 U.S.C. §2614(c).

An employee returning from an FMLA leave is entitled to be reinstated to either the position held when the leave began or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. 29 U.S.C. §2614(a). An equivalent position is one which involves the same or substantially similar duties and responsibilities. 29 C.F.R. §825.215(a). The employee is also entitled to return to the same shift or the same or an equivalent work schedule and to the same or a geographically proximate worksite. 29 C.F.R. §825.215(e)(1)-(2). In order for the reinstatement rights to apply, the employee must be able to perform the essential functions of the position (with or without accommodation, if the serious health condition also qualifies as a disability under the ADA). 29 C.F.R. §825.214(b). An employee out of work as a result of his or her serious health condition for more than 12 weeks is no longer protected by the FMLA and has no right to return to the same or equivalent position. But s/he may have a right to additional time off or to light duty as a reasonable accommodation under the ADA.

An employee is also entitled to substitute accrued paid leave for unpaid FMLA leave. 29 U.S.C. §2612(d). If an employee qualifies for FMLA leave as well as indemnity benefits under a workers’ compensation program, the employer may (and should) run FMLA leave time and
workers’ compensation leave time concurrently. If an employee is protected under the FMLA, the employer cannot require the employee to return to light duty during his or her FMLA leave, even if light duty is part of the employer’s workers’ compensation program. 29 C.F.R. §825.207. However, an employee entitled to an FMLA leave may voluntarily elect not to take the leave and, instead, to accept a light duty assignment. 29 C.F.R. §825.702(d). Most states allow an employer to deny an employee workers’ compensation benefits for any period the employee refuses a light duty job that fits within the employee’s restrictions.

Under the FMLA, when an employee is entitled to leave for the employee’s own serious health condition, s/he can take leave intermittently or elect to work a reduced schedule when medically necessary. 29 U.S.C. §2612(b)(1). If an employee requests intermittent or reduced leave that is foreseeable based on planned medical treatment, the employer may require him or her to transfer temporarily to an available, alternative position that the employee is qualified for, that has equivalent pay and that better accommodates the recurring periods of leave. 29 U.S.C. §2612(b)(2). If part-time leave is allowed, the employee must make a reasonable effort to schedule all medical treatment in a manner that will not disrupt the company’s operations. 29 C.F.R. §825.117.

VII. Employer Obligations for and Opportunities Related to Work Injuries Under the ADA

Work injuries can qualify as disabilities for ADA and state “mini-ADA” purposes. It is important, therefore, that employers investigating workers’ compensation injuries keep in mind that their injured employees may be entitled to the rights afforded them by the ADA. Some work-related injuries clearly qualify as disabilities for ADA purposes: those resulting in lengthy hospitalizations; those resulting in what are sure to be extensive, permanent disabilities; those resulting in amputations; etc. Others injuries are tougher to gauge. But, even though employers have no obligation to treat as disabilities physical or mental conditions that are not apparently disabling under the ADA’s definitions, wise employers keep in mind that they may have obligations under the ADA and that, if ever challenged as to why they didn’t treat a particular condition as disabling, will have to show to a jury’s satisfaction that they reasonably could not or should not have done so. And juries are very tough audiences.

A disability, for ADA purposes, is a physical or mental impairment that substantially limits one or more of an employee’s major life activities. 42 C.F.R. §1630.2. Unlike the FMLA, an employee need not meet any employment tenure or hours worked requirements to be eligible for the benefits provided by the ADA. Those benefits include the right to have one’s physical or mental restrictions reasonably accommodated, 42 C.F.R. §1630.2(o), and to be engaged by the employer in an interactive process to consider whether any such accommodation is available. See Guidance to 42 C.F.R. §1630.2(o). An employee with a disability does not have a right to any preferred reasonable accommodation or to the “best” accommodation, but only to a reasonable accommodation. See Guidance to 42 C.F.R. §1630.9. And the employer may choose, from among two or more such accommodations, which it is going to provide. See Guidance to 42 C.F.R. §1630.2(o), §1630.9.

An employee with a disability also has a right not to be discriminated against based on his or her disability; that is, s/he may not lawfully be treated adversely based on disability in hiring or terms and conditions of employment: terminated, disciplined, demoted, not promoted, transferred to different work or hours or location (except as a reasonable accommodation), etc. 42 C.F.R. §1630.4. And the employee has a right not to be retaliated against for having disclosed a disability or requested an accommodation. See id.
VIII. Employer Obligations for and Opportunities Related to Work Injuries Under OSHA’s Recordkeeping and Reporting

OSHA requires that work-related injuries be recorded on “OSHA 300 Logs,” which must be retained for five years. See 29 C.F.R. §§1904.29(a), 1904.33(a). In addition, for every entry on a 300 Log, an employer must create and maintain for five years an “OSHA 301 Form”. Id. That form, for which employers may substitute their workers’ compensation first reports of injury forms so long as they include everything required by the 301 Form, provides the detail underlying the respective entry on the 300 Log.

While, at first blush, the criteria for OSHA recordability and WC reportability look to be the same (and often, unfortunately, are presumed by employers to be the same), the criteria that OSHA has established, see 29 C.F.R. §§1904.4, 1904.5, are different from those most states have adopted for WC reportability. Not everything reportable for WC purposes is recordable for OSHA purposes. But most injuries recordable for OSHA purposes are reportable for WC purposes. In other words, the “universe” of OSHA recordable injuries is generally smaller than the “universe” of WC reportable injuries. But many WC reportable injuries are also OSHA recordable, and employers investigating work injury claims need to know which are which.

OSHA also requires that employers report to it any work-related fatality, amputation, hospitalization, or loss of an eye. See 29 C.F.R. §1904.39. A fatality must be reported within eight hours of an employer’s becoming aware of it, and an amputation, hospitalization or loss of an eye must be reported within 24 hours of an employer’s becoming aware of it. A hospitalization, however, does not include just any visit. The employee must be admitted for and receive treatment in order for the visit to qualify. And a surgical amputation made necessary by a work incident also qualifies as reportable. Amputations include the loss of just flesh; no bone need be lost. But “avulsions” are not amputations.

A death that results from a work incident but that does not occur within 30 days of the incident need not be reported. 29 C.F.R. §1904.39(b)(6). An amputation, hospitalization or loss of an eye that does not occur within 24 hours of the work incident also need not be reported. Id.

IX. Conclusion

When an employee reports a work injury, it is important that the employer understand the applicable workers’ compensation statute or program so that its investigation effectively gathers all the relevant information necessary to determining whether the employee is entitled to any benefits for the work injury. Equally important for the employer is that it ensure it is meeting all its obligations and that it is taking advantage of all its opportunities under the FMLA, other similar state or local leave laws, the ADA, and OSHA’s recordkeeping and reporting rules.
Workers’ Compensation and the FMLA: Properly Investigating and Handling Occupational Injuries

Presenters
Tina Bengs (Valparaiso) and Eric Hobbs (Milwaukee)

Moderator
Margo Lopez (Washington, D.C.)

Considerations in Investigation

- WC
- FMLA
- ADA
- Others
  - OSHA
  - Benefits
  - Company policy
Workers’ Compensation

- State specific laws
- Investigation key to determining compensability and defenses
- Other employment obligations

General WC Requirements

1) Employee-employer relationship
2) Physical or mental injury or illness
3) Causal connection to employment
4) Need for medical care
5) Disability benefits if unable to work
Possible WC Defenses for Some States

1) Injury caused by drugs/alcohol
2) Failure to use safety device caused accident
3) Injury occurred during commission of offense
4) Violation of posted safety rule
5) Intentional injury
6) Horseplay

The Investigation

- Worker = “employee”
  - Borrowed servant
  - Dual employment (temp employee)
  - Control over work performed

- Accident within scope of employment
  - During work time
    - Private errand or break
  - On work site
    - Traveling between work sites
The Investigation

- Interview injured worker
  - When, where, what, how
  - Safety concerns before/at time of incident
  - Involvement/contribution by others
  - Happen before
  - “Upset” conditions

The Investigation

- Interview witnesses
  - When, where, what, how
  - Anything unusual before/at time of incident
  - Happen before
  - “Upset” conditions
  - Related safety concerns before/at time of incident
The Investigation

- Medical Records/History
  - Recent visits to HCP
  - Prescribed treatment
  - Self-treatment
  - Restrictions
  - Obtain medical records

The Investigation

- Site inspection
  - Take photos, make drawings, video processes
  - If site camera, obtain video footage
  - Consider need to re-enact incident
  - Determine need for expert to determine cause
  - Consider changes to site or processes
The Investigation

- Causal connection to work
  - Medical expert opinion
  - Vocational expert opinion
- Evidence of possible defenses
  - Drug/alcohol screening
  - Police accident reports
  - Surveillance

Spotting Possible Issues

- Credibility of employee or witness
  - Described accident could not have happened
  - Described accident could not have caused the claimed injury
  - Inconsistencies in description of accident
  - No witnesses, reported immediately after start of shift
Spotting Possible Issues

- Timely return to work
- Delays with treatment
- If safety rule violated, is discipline appropriate
- If unsafe conditions at work, remediate

Reminders

- Communicate with TPA/Insurer
  - Possible defenses
  - Non-compliance with treatment or RTW, possible benefit denial
- Communicate internally
  - HR – coordinate FMLA, ADA, policies
  - Benefits
FMLA

- Employee – worked 1,250 hours in prior 12 months and employed 12 months total
- Entitled to 12 weeks leave
- If serious health condition and cannot perform job

FMLA

- Serious health condition
  1) Physical or mental condition resulting in incapacity for more than 3 consecutive calendar days,
  2) That involves either:
     a) inpatient care or
     b) continuing treatment
FMLA

- Continuing treatment
  1) In-person treatment by HCP at least twice within 30 days; or
  2) In-person visit with HCP and regimen of continuing treatment.

“Regimen of continuing treatment” can include:
  1) A course of prescription medication; or
  2) Therapy requiring special equipment to resolve/alleviate the SHC.
Failure to Notify of FMLA Rights

- Interference with FMLA rights
- Waiver of right to require use of FMLA leave

ADA or State Disability Laws

- Physical or mental impairment
- Substantially limits a major life activity
  - Working, lifting, walking, etc.
ADA or State Disability Laws

- Engage in interactive process
- Provide reasonable accommodation
  - Allows performance of essential job functions
  - May include leave, modify work area, eliminate non-essential functions, etc.

Failure to Determine ADA May Apply

- Interference with ADA rights
- Failure to engage in interactive process
- Failure to provide reasonable accommodation
Reminder – OSHA

- OSHA recording
- OSHA reporting
- Corrective action

Hypothetical

- Injured Ingrid
  - Claims back injury, fell while carrying 40 lb. part
  - Job involves lifting/twisting/carrying
  - No witnesses, but employees nearby
  - History of back pain, non-occupational and occupational
Hypothetical

- Injured Ingrid
  - Ambulance took Ingrid to ER, kept overnight
  - ER doc concluded strain related to lifting at work
  - Employee saw PCP
    - Rx: bed rest, ice/heat, no work 5 days, then 10 lb. lift restriction for 2 weeks

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