

# The "Bermuda Triangle" of FMLA- ADA-WC

PRESENTED AT 22<sup>ND</sup> ANNUAL ASSE/MSSC/AE  
SAFETY, LEADERSHIP & HR CONFERENCE  
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PRESENTED BY:

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## Your Presenter....



As one of AE's HR Business Partners, Jackie Swiesz brings 15 years' of HR experience to our Members. She provides Human Resource services through responding to hotline calls, conducting HR Needs Assessments, reviewing Employee Handbooks, and providing on-site HR partnering. She also conducts training, assists members with recruiting, and develops policies and programs. Jackie holds a Bachelor of Science degree in Communication and HR Management from MSU-Billings. She is an active member of the Society of Human Resources Management (SHRM).

# Navigating the Treacherous Triangle



## Step 1: Determine Which Laws Apply to the Employer

- ▶ Each law has different requirements as to the size of the employer that is subject to the law and what agencies are responsible for enforcement of the law.
  - ▶ To be subject to the FMLA, an employer must have at least 50 employees.
  - ▶ Workers' compensation laws can apply to businesses with as few as one employee.
  - ▶ To be subject to the ADA, an employer must have at least 15 employees.

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## Step 2: Know What Each Law Requires

- ▶ FMLA is a federal law that provides for 12 weeks of unpaid leave for an employee's own or a family member's serious health condition, for the birth or adoption of a child and for military exigencies. The law also provides 26 weeks for military caregiver leave.
- ▶ ADA is a federal law that prevents employers from discriminating against employees or job applicants because they are a qualified individual with a disability.
- ▶ Workers' compensation is generally a state-run program that allows workers who were injured on the job to receive compensation while they are out of work. It generally does not provide any job protected leave, but an employer may not retaliate against an employee for filing a workers' compensation claim.

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## Step 3: Analyze Whether a Current Situation Implicates Any of These Laws

The following are common examples of where the FMLA, ADA and workers' compensation laws need to be analyzed in tandem.

- ▶ Can an Employer Run FMLA Leave Concurrently With a Workers' Compensation Absence?
- ▶ Can an Employer Exhaust Paid Leave While an Employee Is Receiving Workers' Compensation Benefits and on FMLA Leave?
- ▶ Can an Employer Contact a Health Care Provider Regarding Medical Documentation During a Workers' Compensation, FMLA or ADA Absence?
- ▶ What Happens to Workers' Compensation Benefits or ADA Protections If an Employee Turns Down Light Duty While on FMLA Leave?
- ▶ Does an Employer Need to Provide Health Benefits Continuation If an Employee Is on an Extended Leave of Absence Under the ADA?

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## Step 4: 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) and more.

**LAWS**  
*you need to*  
**KNOW**

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## Purpose of the ADA, FMLA, and Workers' Compensation Laws

The ADA prohibits discrimination against applicants and employees who are "qualified individuals with a disability".

The 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, and for the employee's serious health condition.

Workers' Compensation laws provide for payment of compensation and rehabilitation for workplace injuries and minimize employer liability.

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## ADA Interaction with FMLA

- ▶ Where the two laws conflict, an employer must provide the higher standard of protection
- ▶ Where an employer violates both FMLA and ADA, an employee may be able to recover under either or both statutes, but may not be awarded double relief for the same loss



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## Enforcement Authorities for the ADA, FMLA, and Workers' Compensation Laws

**ADA – Equal Employment  
Opportunity Commission (EEOC)**

**FMLA – Department of Labor (Wage  
and Hour Division)**

**Workers' Compensation Laws –  
State Workers' Compensation  
Commissions**

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## Areas of Interplay between ADA, FMLA, and Workers' Compensation

**These are the areas of interplay between the ADA, FMLA, and Workers' Compensation that employers need to consider when managing employee absenteeism.**

**NOTE:** State laws may provide broader protections than federal requirements.

### 1. Employer Coverage

- ▶ ADA – 15 or more employees for 20 weeks during current or preceding calendar year
- ▶ FMLA – 50 or more employees within a 75-mile radius for at least 20 weeks during current or preceding calendar year
- ▶ Workers' Compensation – Applies to most, even small employers. State laws govern.



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## Workers' Compensation

- ▶ Mandatory no-fault insurance, paid for by the employer
- ▶ Employers cannot deduct the cost from wages or otherwise require employees to pay
- ▶ Provides workers injured of the job with
  - ▶ Wage loss compensation
  - ▶ Medical bills paid
  - ▶ Rehabilitation
- ▶ Protects companies from lawsuits
- ▶ With few exceptions, it is the **only** remedy available to insured employees



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## What Qualifies as a Workers' Compensation Injury?

- ▶ Textbook answer: any personal injury or aggravation of an existing injury that occurs
  - ▶ During the course of employment or
  - ▶ By any incident arising out of employment



- ▶ Not every injury or illness qualifies
  - ▶ Simple first aid

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## What Are An Employer's Duties?

- ▶ Maintain workers' compensation coverage for all employees
- ▶ Post a Notice of Coverage
- ▶ Report any injuries within 6 days
- ▶ 2-year hiring preference

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## Worker Compensation Interaction with FMLA & ADA

- ▶ ADA does not recognize injured workers as a separate protected class; protects those workers who are qualified and disabled
- ▶ Employer must consider what steps are reasonable to avoid increased work comp liability while also preventing exclusion of persons with disabilities from jobs they can safely perform

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## Interaction with FMLA & ADA

- ▶ Employee on work comp injury may be brought back to a "light duty" position which places few physical demands on employee
- ▶ ADA does not require an employer to create "light duty"
- ▶ Under work comp an employee can lose benefits if he/she does not accept light duty
- ▶ Under FMLA, an employer cannot make an employee accept light duty

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## Qualifying Events

### ► ADA

- Qualified individual must have a physical or mental impairment that substantially limits a major life activity; OR
- A "record of" such impairment; OR
- Be "regarded" by others as having an impairment



## Qualifying Events (cont.)

### ► FMLA

- The employee's own serious medical condition; OR
- A serious medical condition of the employee's spouse, child, or parent; OR
- The birth, adoption, or foster care placement of a minor child; OR
- Qualifying exigency arising from a family member's call to active duty; OR

## Qualifying Events (cont.)

### ADA and FMLA compared:

- ▶ ADA and FMLA must be analyzed separately
- ▶ Some disabilities may also be serious health conditions
- ▶ However, some FMLA-covered serious health conditions do not qualify under ADA

## Areas of Interplay between ADA, FMLA, and Workers' Compensation (cont'd)

### 2. Employee Eligibility

- ▶ ADA – an employee (or applicant) who is disabled as defined by the ADA, is qualified for the position and can perform the essential functions of the position with or without a reasonable accommodation.
- ▶ FMLA – an employee who has worked at least 12 months and 1,250 hours prior to the start of the leave and who works at a worksite where there are 50 or more employees within a 75-mile radius.
- ▶ Workers Compensation – an employee who has an injury arising out of or in the course of employment with state law exceptions possible for willful misconduct or intentional self-inflicted injuries, willful disregard of safety rules, or intoxication from alcohol or illegal drugs.

### Part-Time Employees: FMLA

Covered by the ADA

Covered if they have worked for 1,250 hours in the past 12 months

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## Types of Leave Available under FMLA

### ► Continued Block of Time

### ► Intermittent Leave

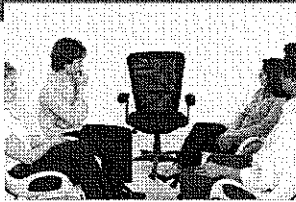
- Leave taken in separate blocks of time for a single illness or injury
- Can be used for planned doctor visits, physical therapy, or other planned treatments for illness or injury
- Can be used for conditions that "flare up" unexpectedly that prevent an employee from doing his job (migraines, arthritis, lupus, bad back, etc.)

### ► Reduced Leave Schedule

- Regular alteration/reduction of scheduled work hours during a certified period
- Employer can recommend to employee, but cannot force employee to take off more time than he/she needs
  - Ex. An employee who has requested intermittent leave cannot be forced to work a reduced schedule instead.

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## Areas of Interplay between ADA, FMLA, and Workers' Compensation (cont'd)



### 3. Length of Leave

- ADA – 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
- Workers' Compensation – No specific limit for the amount of leave an injured worker may have.

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## Areas of Interplay between ADA, FMLA, and Workers' Compensation (cont'd)



### 4. Medical Documentation

- ▶ ADA – 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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## Scenario #1— Medical Exams

### ▶ ADA

- ▶ Exam allowed if job related and consistent with business necessity
- ▶ Full physical not allowed

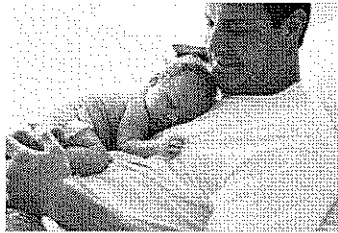
### ▶ FMLA

- ▶ Fitness-for-duty certification required only for return to work (if FMLA applies)

### ADVICE

- Back examination allowed under the ADA
- ADA "trumps" FMLA

## FMLA Medical Certification



- ▶ Employee's Own Serious Health Condition
- ▶ Family Member's Serious Health Condition
- ▶ Pregnancy/Care for Newborns
  - ▶ Montana Maternity Leave Act
- ▶ Adoption or Foster Care
- ▶ Military Leave
- ▶ Military Caregiver

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## FMLA Sequence of Employer's Responsibilities

- ▶ Establish Method of Recording Leave
- ▶ Establish Policies for Applying Paid/Unpaid Leave
- ▶ Response to Employee's Request/Notification for Leave
- ▶ Notification of Eligibility and Provider's Certificate
- ▶ Designation Notice to Employee
- ▶ Potential Re-Certification(s) During Leave
- ▶ **Return-To-Work Release**
- ▶ **Job Restoration**
- ▶ **Maintenance of Health Benefits**

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## Areas of Interplay between ADA, FMLA, and Workers' Compensation (cont'd)

### 6. Fitness-to-Return-to-Work Certification

- ▶ ADA – 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.

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## Interaction with FMLA & ADA

- ▶ Employee on work comp injury may be brought back to a "light duty" position which places few physical demands on employee
- ▶ ADA does not require an employer to create "light duty"
- ▶ Under work comp an employee can lose benefits if he/she does not accept light duty
- ▶ Under FMLA, an employer cannot make an employee accept light duty

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## Areas of Interplay between ADA, FMLA, and Workers' Compensation (cont'd)

### 7. Benefits While on Leave

- ▶ ADA – No specific requirements but cannot discriminate and must provide same benefits as those provided to employees on non-ADA 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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## Scenario #2—Benefits

### ▶ ADA

- ▶ Does not require continuation of benefits during leave unless employer continues for other types of unpaid leave

### ▶ FMLA

- ▶ 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 "trumps" ADA

## Areas of Interplay between ADA, FMLA, and Workers' Compensation (cont'd)



### 8. 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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## Scenario #3— Reinstatement

### ▶ ADA

- ▶ Requires reinstatement to same position
- ▶ If same position is no longer available, must place in lower vacant position
- ▶ No "bumping" or promotions required

### ▶ FMLA

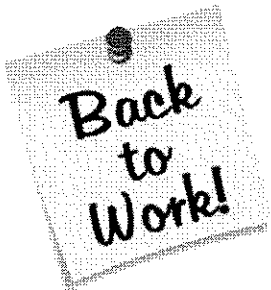
- ▶ Requires reinstatement to same or equivalent position
- ▶ Required only if employee can still perform essential functions of job

### ADVICE

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



## Getting Them Back to Work



- ▶ Never rush injured worker back to work
- ▶ Setting up a job for the injured worker
- ▶ Doesn't have to be in the same department-can be anywhere in the company
- ▶ Talk to the injured employee before assigning the job
- ▶ Set performance standards

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### Example of Employee Absence Involving Interaction of ADA, FMLA, and Workers' Compensation

Alice Morgan, an assembly line worker, has called in sick for three days citing extreme back pain. She has been with XYZ Manufacturing, a company with over 500 employees, for three years working full-time with very few absences. Alice calls in sick for the fourth day stating that she was examined by her doctor who took x-rays and stated that she needs complete bed rest and possibly back surgery and will be unable to work for an extended period of time. She states that her doctor thinks the condition is caused by the type of work she has been doing.

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### **Example of Employee Absence Involving Interaction of ADA, FMLA, and Workers' Compensation (cont'd)**

**Using the areas of interactions between the ADA, FMLA, and Workers Compensation laws, here is an analysis of Alice's absence.**

1. Employer Coverage – XYZ Manufacturing is covered under and must comply with the ADA, FMLA and the state Workers Compensation Laws.
2. Employee Eligibility – Alice may be eligible for protection under the ADA and FMLA, depending on the severity of her condition. A workers' compensation claim must be filed, processed, and a determination made as to coverage under Workers' Compensation.

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### **Example of Employee Absence Involving Interaction of ADA, FMLA, and Workers' Compensation (cont'd)**

3. Length of Leave – Leave as a reasonable accommodation under the ADA is not an issue at this point as Alice's absence, with proper medical certification, will be designated as FMLA leave. Should her absence exceed 12 weeks, additional leave of absence may be a reasonable ADA accommodation. If the condition is determined to be work-related, workers' compensation leave will run concurrently with the FMLA leave.
4. Medical Documentation – Under the ADA, no medical documentation is yet required. FMLA medical certification is required. Medical documentation will be required by the workers' compensation insurer.

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### Example of Employee Absence Involving Interaction of ADA, FMLA, and Workers' Compensation (cont'd)

5. Restricted or Light Duty – Not required at the present time as Alice is unable to work in any capacity until further notice. When she is able to return to work and if she has medical restrictions, light duty, if available, must be offered as a reasonable accommodation under the ADA unless this creates an undue hardship on the employer. Light Duty cannot be required if FMLA leave is still available. Light duty should be offered under Workers' Compensation.
6. Fitness-to-Return-to-Work Certification - Not required at the present time as Alice is unable to work in any capacity until further notice. When she is able to return to work, depending on any restrictions, she may be required to provide this certification under the ADA, FMLA, and Workers' Compensation.

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### Example of Employee Absence Involving Interaction of ADA, FMLA, and Workers' Compensation (cont'd)

7. Benefits While on Leave – Not required under the ADA. Under FMLA, Alice's health benefits will be continued at the same level as prior to her leave and she will receive other benefit continuation given for employees on similar non-FMLA leave. No additional benefit continuation under Workers' Compensation is required.
8. Reinstatement – Alice must be reinstated to her previous job under the ADA unless doing so would create an undue hardship on her employer. If she can return before her 12 weeks of FMLA leave have been exhausted, she will be reinstated in her previous or a similar position. Workers' Compensation does not provide for reinstatement under most state laws, except for retaliatory discharge.

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## Employee Doesn't Return To Work – Now What?

Under FMLA...

- ▶ If 12 weeks are up and company does not have any contradictory policies, the employee can be terminated.

**MISSING**



**HAVE YOU SEEN THIS MAN?**

Walter White  
Age: 35 Height: 5'7 Weight: 165  
Last seen: 10/10/10 at 10:00 AM in the parking lot of the...  
If you have any information, please call...

**PLEASE - INFORMATION NEEDED**

- ▶ HOWEVER, other laws may enter in
  - ▶ ADA; Montana Maternity; Workers' Compensation

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## Disciplining/Firing An Injured Worker

- ▶ Do not fire or discipline an employee for filing a claim
  - ▶ Go out of the way to avoid the appearance
- ▶ Avoid appearance of treating injured workers unfairly-even if a workers' compensation claim has not been filed yet
- ▶ Documentation is critical

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## Termination

### ► ADA

- Permitted if employee cannot perform job and no reasonable accommodation can be made

### ► FMLA

- Permitted if an employee fails to return to work and if the ADA does not offer additional protection



## Comparison of ADA & FMLA

### ► ADA

- No service requirements
- Protection based on employee's ability to perform job
- Disabilities are not temporary
- Request for an accommodation is triggering event
- Accommodation is an interactive process
- Does not require employer to provide a certain amount of time off

### ► FMLA

- Employee has to meet service requirements
- No requirement that employee can perform essential functions of job
- Serious health condition can be temporary
- Employer designates leave under FMLA
- Employee must provide proper/timely certification of need for leave
- Provides up to 12 weeks of protected leave

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## Summary



- ▶ It is important to recognize and evaluate the interaction of the ADA, 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.
- ▶ Employers have legal responsibilities to comply with these laws and face significant violations for non-compliance.
- ▶ Employers have ethical and moral responsibilities to assure employees receive the benefits and protections these laws provide.

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## Summary (cont'd)

- ▶ The three laws have different purposes.
  - ▶ The ADA prohibits discrimination.
  - ▶ The FMLA sets minimum leave standards.
  - ▶ Workers' Compensation laws provide for payment of compensation and rehabilitation for workplace injuries and minimize employer liability.
- ▶ The ADA is enforced by the EEOC, FMLA by the DOL and Workers' Compensation laws by state workers' compensation commissions.

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## Summary (cont'd)

Important areas of interplay between the three laws are:

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

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# Questions?? Thank You!



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