



**Strategies Addressing Employee Return to Work,  
Termination, and Retaliation Liability in Workers'  
Compensation, FMLA, and ADA Claims**



# Strategies Addressing Employee Return to Work, Termination, and Retaliation Liability in Workers' Compensation, FMLA, and ADA Claims



## Presenter



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# Return to Work Strategies

## Goals

1. Provide strategies for returning injured employees to work under BWC, FMLA, and ADA rules and regulations.
2. Learn strategies to save claim costs.
3. Learn the formal requirements necessary for a light-duty offer of work under Ohio workers' compensation laws.

# Return to Work Strategies

## Participants will learn:

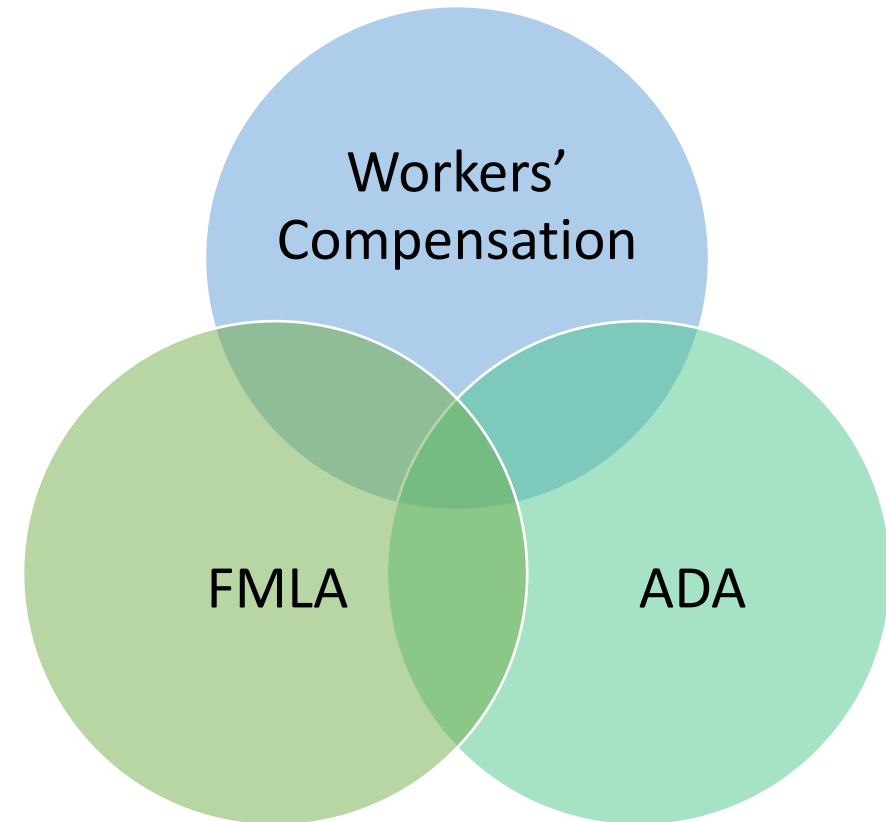
1. Light-duty options for employees to return to work under BWC, FMLA, and ADA.
2. The formal requirements necessary for a light-duty offer of work under workers' compensation laws in the state of Ohio.
3. Relevant BWC, FMLA and ADA rules and regulations.
4. Claim cost mitigation.
5. Strategies to avoid retaliation claims.

# When Will My Employee Return to Work?



# Overview

- How do these laws work together?
- How to use the laws to work for the employer?



# Injured Worker on Leave

## Proper Ways to Respond to Injuries

- Workers' compensation
  - Temporary Total Compensation, Salary Continuation, Living Maintenance, Light Duty
- FMLA
  - Leave of Absence
- ADA
  - Workplace Accommodation

# “Off Work” is not “On Leave”

## Workers' Compensation

- Temporary Total Compensation
  - Medco-14 and C-84
- Salary Continuation
  - C-55
- Living Maintenance
  - Vocational Rehabilitation

# Injured Worker on FMLA Leave

## Proper Ways to Respond to Injuries

- FMLA
  - Leave of Absence
  - Paid or Unpaid Leave?
  - Sick, Personal

# Injured Worker on ADA Leave

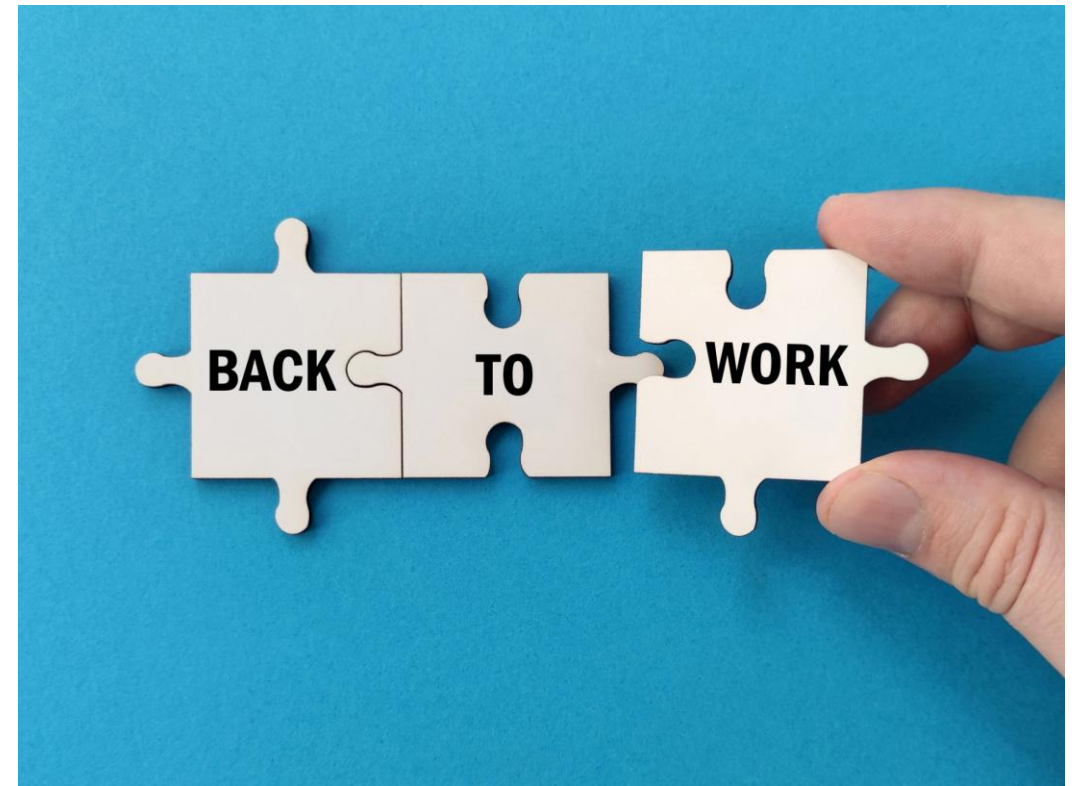
## Proper Ways to Respond to Injuries

- ADA
  - Leave of Absence as Reasonable Accommodation
  - Paid or Unpaid Leave?
  - Sick, Personal

# Return to Work Strategies

## Full Duty Release:

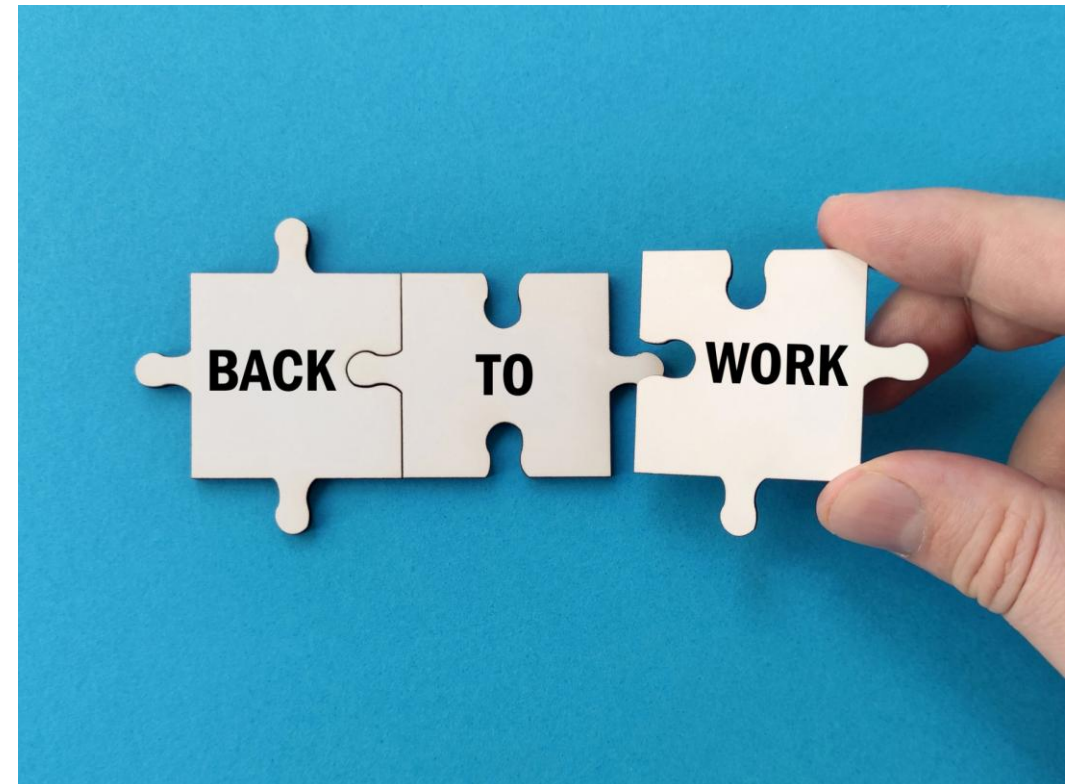
- Former position
- Equivalent position with equivalent benefits, pay, and other terms and conditions



# Return to Work Strategies

## Maximum Medical Improvement

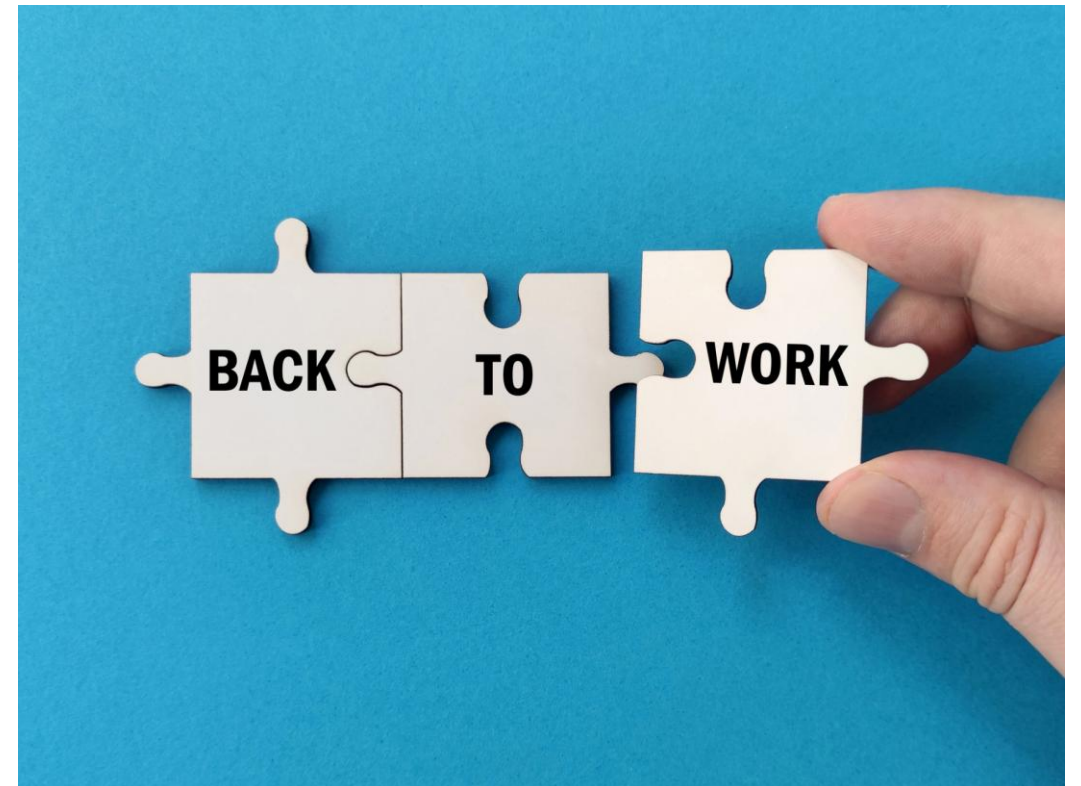
- Terminates temporary total compensation
- Employee could still be disabled from work



# Return to Work Strategies

## Other Considerations:

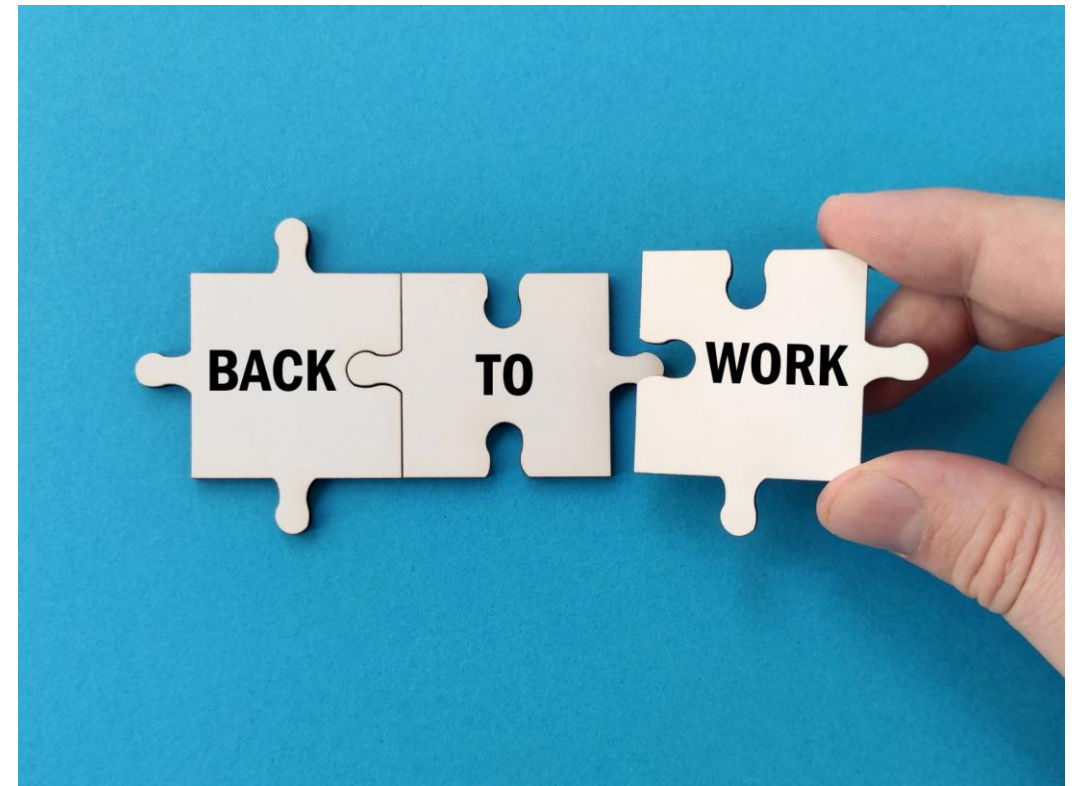
- Written Employer policies and procedures
- Collective Bargaining Agreement
- Employment contract
- Past practices



# Return to Work Strategies

## Other Considerations (continued)

- Written policy on length of absence
- Termination of employment
- Retaliation Lawsuit



# Return to Work Strategies

## Light Duty Release

- Single, most-effective return-to-work strategy available
- Least utilized tool to return employees to work
- Be creative
- Have a written policy

# Return to Work Strategies

## Benefits

- Employee earns full wages, retains all benefits, earns service credit and continues as an active member of the workforce
- Saves on workers' compensation costs
- Decreases legal costs
- Decreases hiring and training expenses
- Increases morale
- Observe employee's restrictions

## Considerations for State Fund Employers

- Are claim costs likely to exceed the claim's max value?
  - Catastrophic claims
- Will the cost of salary continuation exceed increase in claim costs?
  - Low cost claims
  - High earners exceed TT maximum
- Do claim costs still impact the Employer's premiums?
  - One year snapshot
  - Out of Employer's experience

# Return to Work Strategies

## Light Duty Release (continued)

- Provide written job description to employee's doctor and get approval
- Offer in writing sent via certified mail
- Functional capacity evaluations
- Engage the employee in process

# Return to Work

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- Employee is found MMI but not released to return to work, or
- Employee is released to return to work on light duty and there is no light duty available, or
- Employee is released to return to work for allowed conditions, but non-allowed conditions prevent the employee's return to work, or
- Employer is concerned employee will re-injure themselves.

# Family & Medical Leave Act Inquiry

## First Inquiry

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- Does the employee qualify for FMLA?

# Family & Medical Leave Act Criteria

## FMLA applies IF:

- Private Employers
  - 50+ employees w/in 75 miles
- Public Employers
  - No employee or miles threshold
- Employee worked at least **12 months and 1,250 hours** prior to leave (special exception for teachers – but a rebuttable presumption)



# Family & Medical Leave Act: Eligible Employees

The **FMLA entitles** eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons (“qualifying event”)



# Family & Medical Leave Act: Employees are Entitled to...

**Eligible** employees are entitled to:

- **12** work weeks, unpaid, **job protected** leave in a 12-month period
- **26** work weeks of unpaid **job protected** leave to care for a **military service member** during a 12-month period



# Questions to Ask When FMLA is Requested



- Is the employee eligible for FMLA?
- Is FMLA being requested for a qualifying event?

# Qualifying Event



- **Birth** of a child or care for newborn
- **Placement** of child for adoption/foster care

# Qualifying Event



- Care for spouse, child, or parent with a **serious health condition**
- Employee's **own serious health condition** which renders the employee unable to work

# Qualifying Event



- Qualifying Exigency spouse, son, daughter or parent is on covered active duty or called to active duty
- To **care** for **covered service member** with a serious injury or illness

# “Serious Health Condition”

An illness, injury, impairment, physical or mental condition that involves:

- **Any** inpatient Care



# “Serious Health Condition” Includes

- Incapacity of more than 3 consecutive calendar days

*and*

- **2+** treatments by healthcare provider, or
  - **1** treatment resulting in regimen of continuing treatment (i.e., drugs)



# “Serious Health Condition” Examples

Includes:

- **Pregnancy**
- **Chronic conditions** (Crohn's, migraines, diabetes)
- **Permanent conditions** (Alzheimer's, stroke)



# “Serious Health Condition”: Does Not Include...

Does **NOT** include:

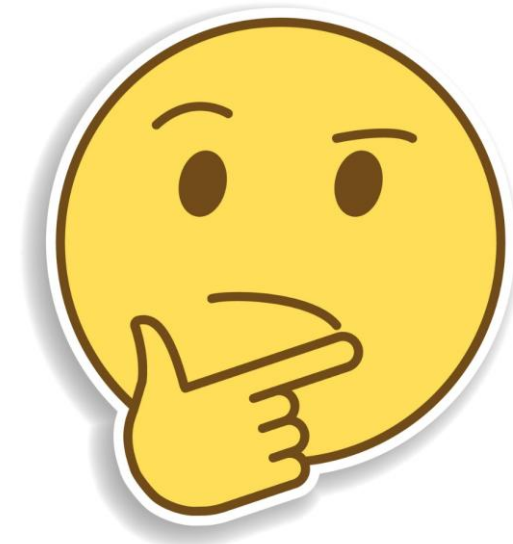
- Common cold or the flu
- Earaches
- Upset stomach or minor ulcers
- Headaches (other than migraine)
- Routine dental or orthodontia problems

**But...**



# Intermittent Leave

Out Monday → Thursday  
+  
Doctor Visit  
+  
Drugs  
=  
*potential* FMLA eligibility



# Family & Medical Leave Act: Prohibitions

- An employer is prohibited from interfering with, restraining, or denying the exercise of, or the attempt to exercise, any FMLA right.
- An employer is prohibited from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise any FMLA right.



# Family & Medical Leave Act: Prohibitions

- An employer is prohibited from discharging or in any other way discriminating against any person, whether or not an employee, for opposing or complaining about any unlawful practice under the FMLA.



# Family & Medical Leave Act: Prohibitions

- All persons, whether or not employers, are prohibited from discharging or in any other way discriminating against any person, whether or not an employee, because that person has —



# Family & Medical Leave Act: Prohibitions

- Filed any charge, has instituted, or caused to be instituted, any proceeding under or related to the FMLA;
- Given, or is about to give, any information in connection with an inquiry or proceeding relating to any right under the FMLA; or
- Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA.



# Family & Medical Leave Act: Examples

- Refusing to authorize FMLA leave for an eligible employee,
- Discouraging an employee from using FMLA leave,
- Manipulating an employee's work hours to avoid responsibilities under the FMLA,



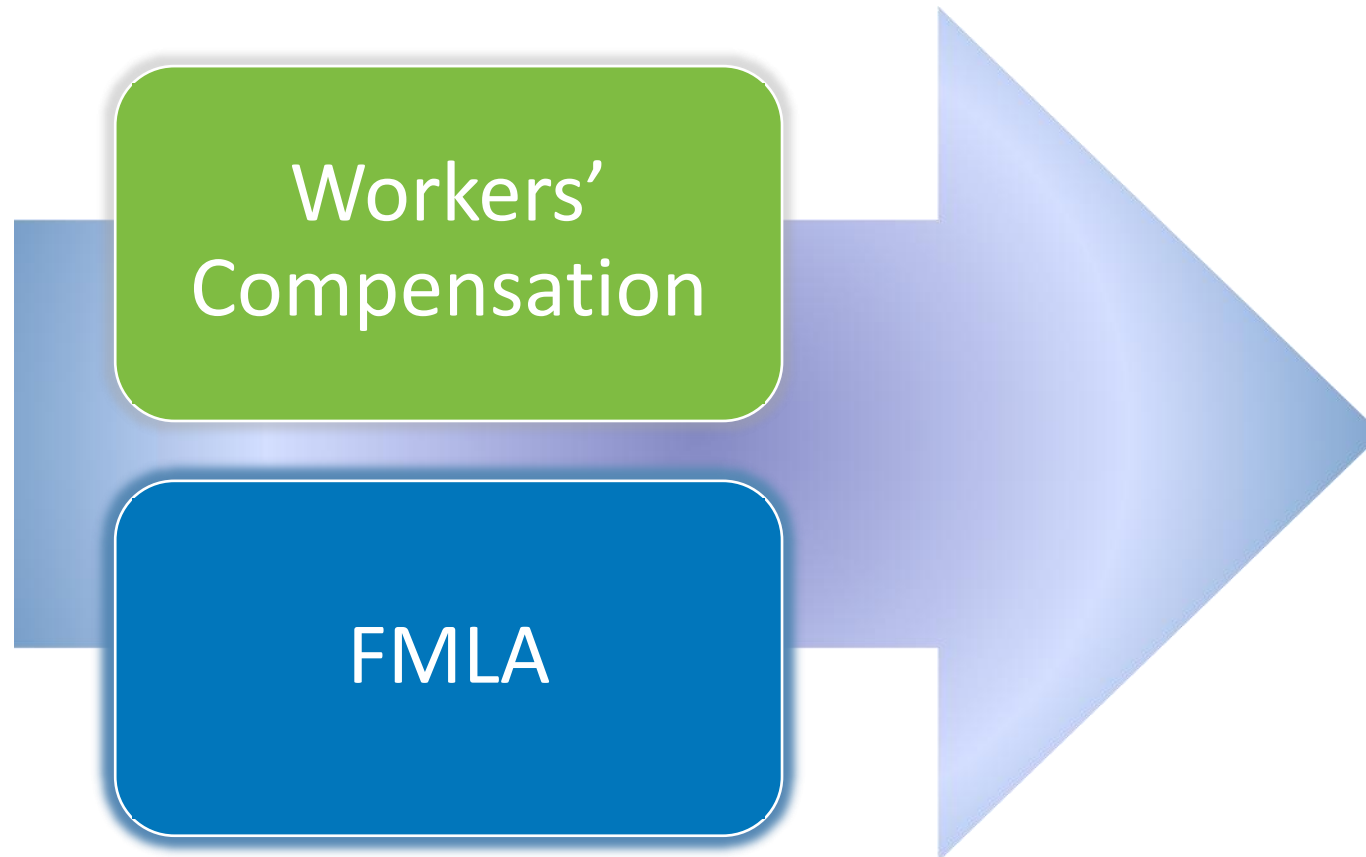
# Family & Medical Leave Act: Examples

- Using an employee's request for or use of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or,
- Counting FMLA leave under "no fault" attendance policies.



# FMLA and Workers' Comp

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# Intermittent Leave: What Now?

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- FMLA is expiring
- Injured worker is released to return to work light-duty, but we don't have light duty for him.

**What now?**

**Does my employee's  
medical condition qualify  
as a disability  
under the ADA?**

# Americans with Disabilities Act As Amended (ADA)

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# ADA Prohibits Discrimination Against:

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- An otherwise “qualified individual with a disability”
- *Because of* that disability
- In job application, hiring, and other terms and conditions of employment.

# “Qualified Individual with a Disability”

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A person with a disability who:

- Meets the skill, experience, education, and other job requirements of a position
- Held or desired; and
- Who with or without reasonable accommodation can perform the essential functions of the job.

# “Disability”

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- Physical or mental impairment that substantially limits one or more **major life activities**
- Record of such impairment **or** is regarded as having such impairment



# “Major Life Activity”

## Major life activity = very broad

- Communicating in writing
- Walking
- Thinking
- Seeing/depth perception
- Bodily functions

(cell growth, digestive system, nervous system, endocrine, etc.)



# English, Please!

Employers may not\* refuse an employee who can return to work if:

- The employee can perform the essential functions of the job
- With or without reasonable accommodations

**\*unless...**

\*unless...

the employee's return poses a "direct threat" to the employee or others

- **DIRECT THREAT:** a significant risk to the health or safety of other employees that *cannot* be eliminated by reasonable accommodation

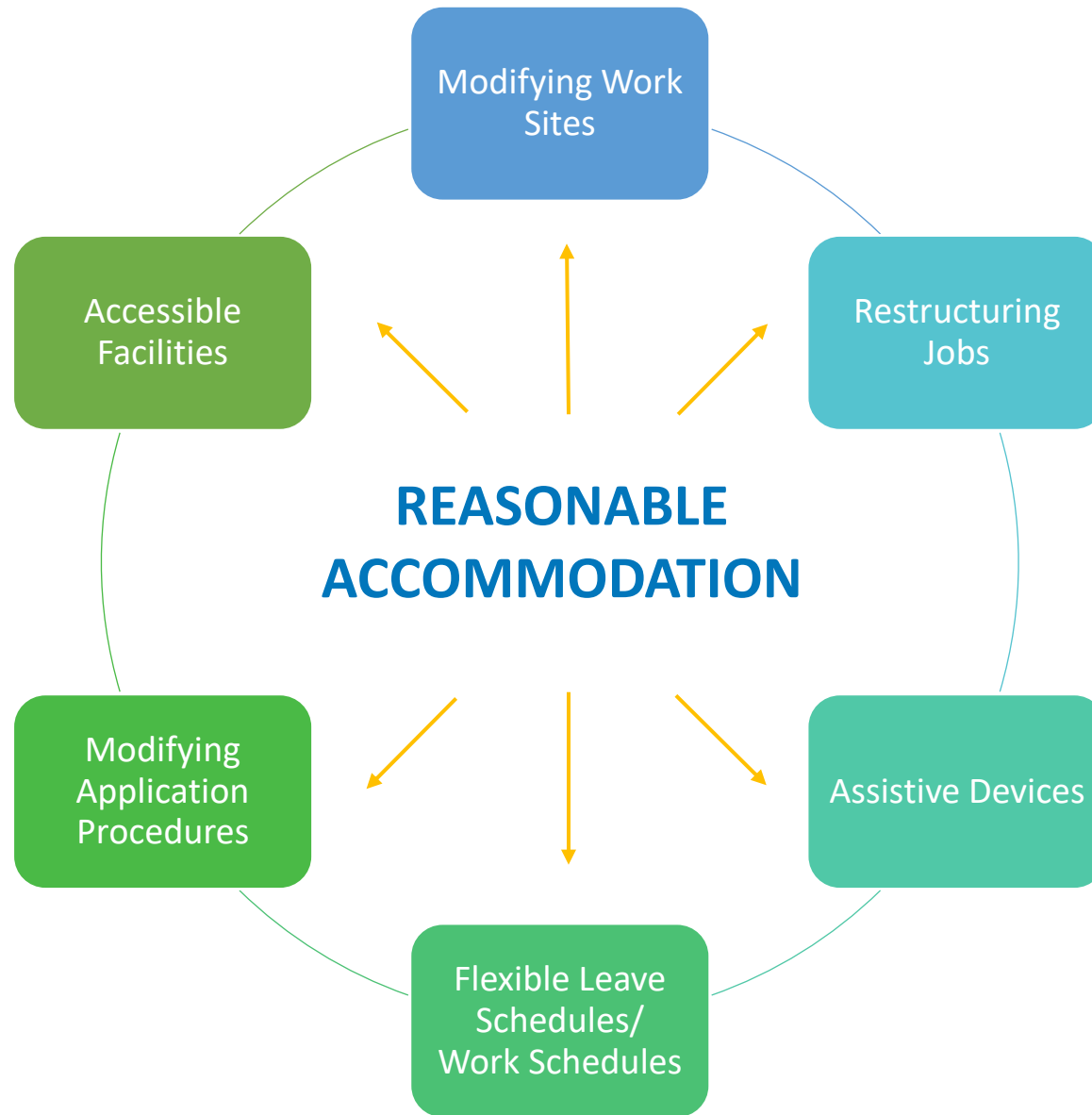
**\*\*employer's burden\*\***



# Reasonable Accommodation

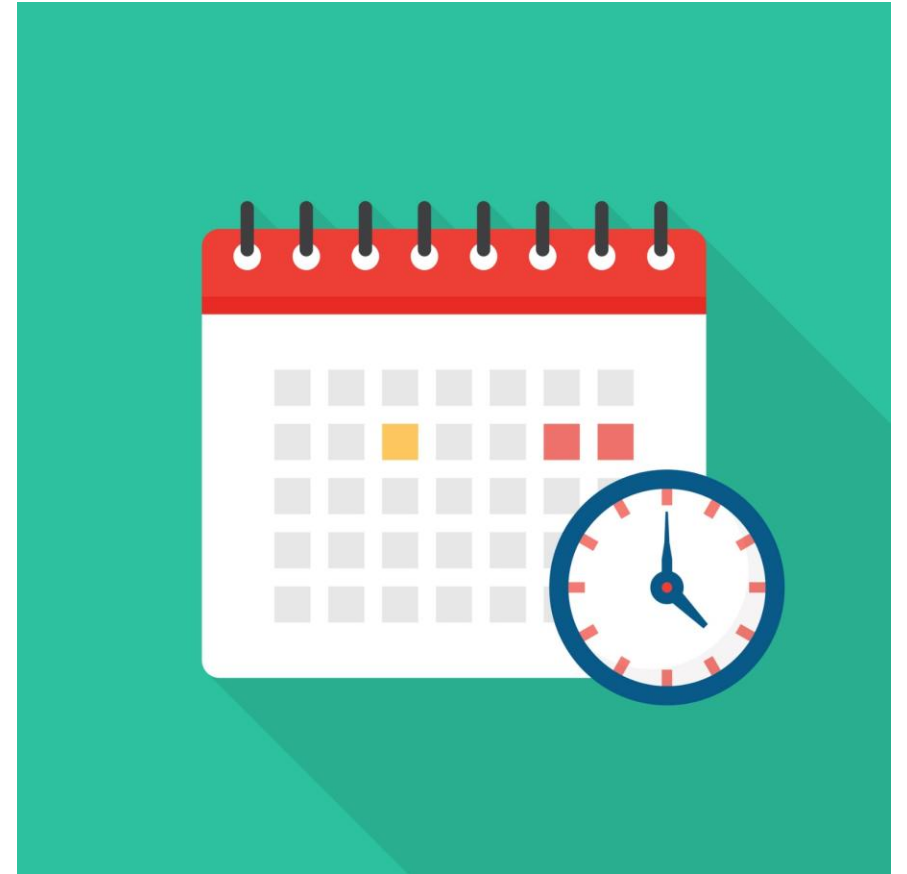
- Modification or adjustment that enables a qualified applicant with a disability to:
  - Enjoy equal benefits and privileges enjoyed by others without a disability
  - Permits performance the essential functions of the job
  - And does not cause an undue hardship on employer





# Reasonable Accommodation

- A reasonable accommodation may also be **additional time off from work**



# Did You Know?

- Failure to accommodate = Discrimination
- If the accommodation does *not* impose an undue hardship on the employer, the employer must accommodate



# Failure to Accommodate Under the ADA

To maintain a claim for failure to accommodate under the ADA, a plaintiff must prove that:

- (1) they qualify as an individual with a disability as defined in the ADA,
- (2) their employer had notice of their disability,
- (3) they can perform the essential functions of their job with a reasonable accommodation, and (4) their employer refused to make any reasonable accommodation.

# Retaliation Under the ADA

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To maintain a claim of retaliation under the ADA, a plaintiff must prove that:

1. they engaged in protected activity,
2. their employer took adverse action against them, and
3. the adverse action was causally connected to their protected activity.

# Retaliation Under the ADA: Adverse Action

- Reprimand the employee or give a performance evaluation that is lower than it should be;
- Transfer the employee to a less desirable position;
- Engage in verbal or physical abuse;
- Threaten to make, or actually make reports to authorities (such as reporting immigration status or contacting the police);
- Increase scrutiny;
- Spread false rumors, treat a family member negatively;
- Change work schedule.

# Retaliation Under the ADA: Adverse Action

- The ADA does not shield an employee from all discipline or discharge.
- Employers are free to discipline or terminate workers if motivated by non-retaliatory and non-discriminatory reasons that would otherwise result in such consequences.

# Injured Worker + Reasonable Accommodation

- FMLA has expired
- Requests 2 more weeks off to continue to recover from back surgery

**Reasonable?**

Yes.



# Another 2 Weeks?

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# Indefinite Leave Does Not Need to be Accommodated



Disclosure of Disability

Request for RA

Can you accommodate?

Respond to RA

Implement RA?

- R.C. 4123.90 states in relevant part:
  - No employer shall discharge, demote, reassign, or take any punitive action against any employee
  - because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.

- The reason for the Employer's action was:
  - Lawful,
  - Legitimate, and
  - Non-retaliatory.
- The Employee must demonstrate, through direct and/or circumstantial evidence, a causal connection between the activity protected by the statute and the adverse employment action, which necessarily entails a retaliatory state of mind.

*Note: This analysis is also applies to retaliation claims available to employees under the FMLA and ADA.*

In analyzing a retaliation claim, courts follow a burden-shifting framework. The Employee must first establish a prima facie case by demonstrating that:

- The Employee alleged they were injured on the job,
- The Employee instituted or pursued a claim for workers' compensation, and
- The Employer committed an adverse employment action against the Employee.

# Retaliation

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- Once the Employee establishes a prima facie case, the burden shifts to the Employer to set forth a legitimate, non-retaliatory reason for the adverse employment action.

- If the Employer can set forth a non-retaliatory reason for the adverse Employment action,
- The burden then shifts back to the Employee to show that the Employer's reason is a pretext and that the real reason for the adverse employment action was the Employee's pursuit of a workers' compensation claim.

An Employee can demonstrate that the Employers' proffered reason for the adverse employment action is a pretext if the Employer's proffered reason:

- Had no basis in fact,
- Was insufficient motivation for the employment action, or
- Did not actually motivate the adverse employment action.

# Retaliation—Ohio Supreme Court Decisions

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- *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141; 2003 Ohio 5357.

VS

- *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351; 2007-Ohio-6751

# Retaliation Cases – In Favor of Employers

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- The employee cannot fulfill certain position requirements such as a required number of work hours each week, physical requirements, etc.;
- The employer has a legitimate, sufficient overriding business justification such as layoffs due to financial considerations;
- The employer was unaware that the employee filed a workers' compensation claim;
- The employee engaged in negligent or reckless conduct;
- The employee received bad performance reports;
- The employee received complaints from customers or clients.

# Retaliation Cases – In Favor of Employers

- An Employer's compliance with its written policy that is facially neutral and consistently enforced that applies to all employees or all employees who are unable to work.
- An Employer's compliance with a Collective Bargaining Agreement that indirectly results in different treatment.
- An Employer's compliance with a federal or state statute that indirectly results in different treatment such as FMLA or ADA.
- An Employer's compliance with the employer's third party contract with an outside vendor for insurance or benefits that indirectly results in different treatment.

# Retaliation Cases – Against Employers

- Statements by the employer of direct retaliation against the employee;
- The close temporal proximity between the employee's filing of a workers' compensation claim and the employer's termination of the employee;
- The employer's change in attitude or treatment toward the employee following the employee work injury or filing of a workers' compensation claim.

# Sick Leave and Health Insurance Benefits

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- Collective Bargaining Agreement?
- At will Employee?
- Written Employer Policy?
- Third Party Vendor Requirements.
  - 80/20 rule with hours threshold
- Is the Employer treating the Injured Employer the same as all other off-work Employees?
- FMLA Leave - Must maintain benefits.

# Sick Leave and Health Insurance Benefits

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- The Employer should be able to provide a legal, specific, objective, legitimate, non-retaliatory reason for any adverse employment action.

# Questions?

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Thank You

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