



**The New USDOL Exemption Regulations:
What Do They Change and Why Do We Care?
And
The “Devil’s Triangle”
ADA / FMLA / Worker’s Compensation**

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What Is Happening With The Federal Standards

- ▶ USDOL issued the Fairpay Overtime Initiative
- ▶ Establishes new minimum salary requirements for exempt workers
 - ◆ \$455 per week
 - ◆ \$23,660 per year
- ▶ Changes the federal duties and salary basis standards
- ▶ Becomes effective on August 23, 2004



So What – Who Cares?

- ▶ Many states have adopted or follow the federal standards

- ▶ BUT – IN MANY STATES, STATE STANDARDS HAVE NOT CHANGED



The “White-collar” Exemptions

- ▶ **Current Law**
 - ◆ **Exemptions for executive, administrative, and professional workers**
 - ◆ **Must satisfy both a duties test and a salary test**
 - ◆ **Have both short and long test on duties**



Executive Exemption (Changes in Parentheses)

- ▶ Must be paid \$250 (\$455) per week on a salary basis
- ▶ Primary duty must be management
- ▶ Must customarily and regularly direct 2 or more other workers
- ▶ (Must have the authority to hire or fire other employees, or make suggestions on employee status that are given particular weight)



Administrative Exemption (Changes in Parentheses)

- ▶ Must be paid \$250 (\$455) per week on a salary basis
- ▶ Primary duty must be non-manual work directly related to the management or general business operations of the employer or the employer's customers
- ▶ Must exercise discretion and independent judgment with respect to matters of significance
- ▶ (An employee who leads a team of other employees assigned to a major project generally meets this requirement)



Professional Exemption (Changes in Parentheses)

- ▶ Must be paid \$250 (\$455) per week on a salary basis
- ▶ Must be a learned professional, artistic professional, or teacher
- ▶ Learned professionals do work requiring advanced knowledge in a field of science or learning customarily acquired through prolonged instruction and must consistently exercise discretion and judgment
- ▶ (Discretion and judgment is eliminated as a separate standard under the new USDOL regulations)

Salary Basis Test (Changes in Parentheses)

- ▶ Must be paid full salary for any work week during which employee works
- ▶ Need not be paid salary if employee performed no work during a work week
- ▶ (The new regulations allow full-day deductions in pay for violations of typical workplace rules – Be Careful)



Outside Salesperson Exemption (Changes in Parentheses)

- ▶ Regularly work away from their employer's place of business
- ▶ Primary duty must be to make sales and take orders
- ▶ Non-sales activities may not exceed 20% of employee's work time (eliminated in the new federal regulation)



What does this mean to the Collision Industry?

- ▶ Generally very little has changed from a shop owner's perspective
 - ◆ Beware of the new salary requirements
 - \$455 a week
 - \$23,660 a year

- ▶ Who is “exempt” in your shop?
 - ◆ **It depends on your state of course, but....**



What does this mean to the Collision Industry?

- ▶ *Typically* “Exempt” under FLSA (type of exemption)
 - ◆ General Manager (executive)
 - ◆ Department Manager (executive)
 - ◆ Production Manager (executive/commission – maybe)
 - ◆ Estimator (executive/commission – maybe)
 - ◆ Techs & Painters (commission – maybe)



Why Should Employers Care?

**EMPLOYERS ARE IN THE
GUNSIGHTS!!!**

CLAIMS ARE ON THE RISE!!!



The Devil's Triangle:

**Workers' Comp,
ADA
and FMLA**

**Each law focuses on a
different element
of the disability process**

The **ADA** attempts to eliminate workplace disability discrimination by:

1. Emphasizing what employee can do as opposed to focusing on an employee's limitations;
2. Requiring employers to evaluate an individual's fitness to **perform the essential functions of the job** on a case-by-case basis; and
3. Considering any **reasonable accommodation** in the process.



FMLA is concerned with:

- ▶ Providing a minimum level of unpaid, job-protected leave to eligible employees;
- ▶ Covering those who suffer from a **serious health condition**; and
- ▶ Protecting those employees from adverse treatment because of the need for leave.



Workers Compensation emphasizes:

- ▶ What employee cannot do by focusing on the nature and percentage of their disability;
- ▶ So as to provide suitable compensation for lost earnings,
- ▶ Resulting from a **work-related injury**.



Persons Protected by Title I of the ADA

A qualified individual with a disability-
defined as an individual with a disability
who, with or without reasonable
accommodation, can perform the
essential functions of the job that
he/she holds or desires.



Requirements for ADA Coverage

**Impairment must “*Substantially*
limit one or more major life
activities”**



Requirements for ADA Coverage

Must be able to perform the essential functions of the job, with or without a reasonable accommodation





**Examples of major life activities:
Seeing • Hearing • Walking
Talking • Working**



Temporary impairments not covered



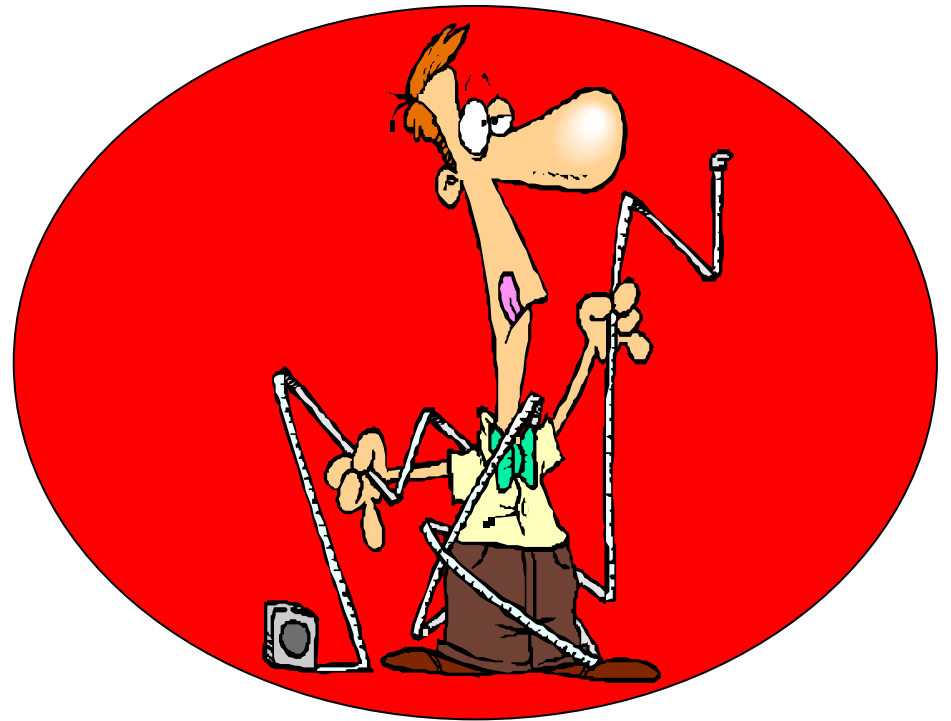
*The Good
News:*
**Employers
usually
win
ADA
lawsuits!**



**From the
Americans
with
Disabilities
Act...**



**...to the
“Californians
with Mere
Difficulties
Act”**



Disability =

**A physical or
mental
condition that
“limits” a major
life activity**



Disability =

**No requirements
of a *substantial*
limitation**



California

**“Limitation” means
making the
achievement of the
major life activity
“difficult”**



Persons Protected by Title I of the ADA

When is a disabled individual
qualified for the job?



WHO IS “QUALIFIED”?

Must be able to do the job

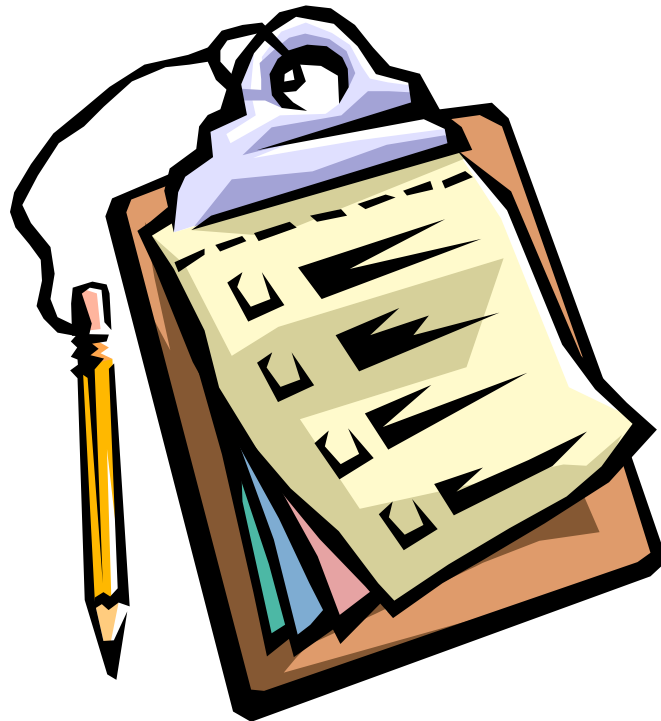
- ✓ Education/experience/skills standards
- ✓ Able to perform essential functions
- ✓ With or without “Accommodation”



Make sure job descriptions are accurate



Include intangible job functions in job descriptions



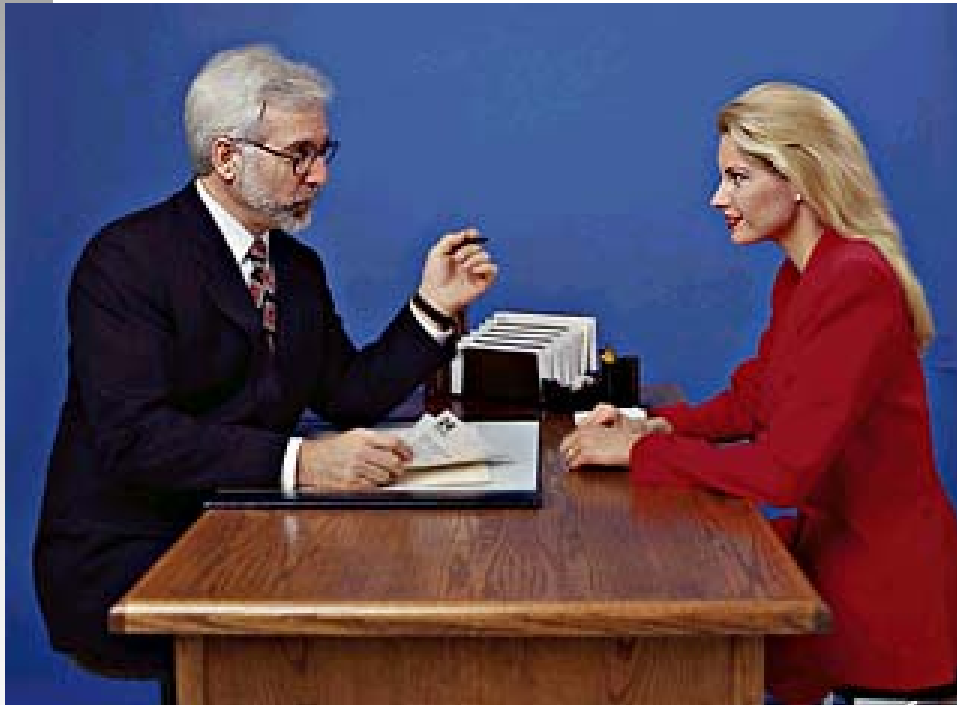
Intangible Job Functions



**The ability to
appear
for work on
time**



Intangible Job Functions



**The ability to
follow
directions
from a
supervisor**



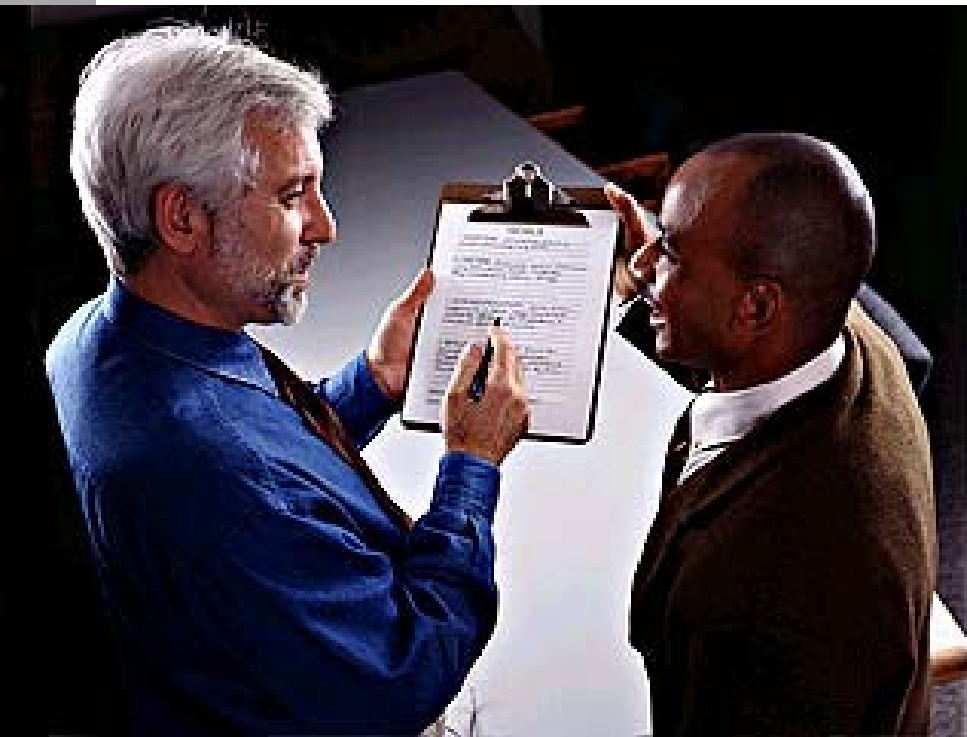
Intangible Job Functions



**The ability to
interact
effectively with
co-workers**



Intangible Job Functions



The ability to understand and follow posted work rules and procedures



Intangible Job Functions



**The ability to
accept
constructive
criticism**



Intangible Job Functions



**For managers
and
supervisors,
the ability to
lead and
manage others**



Implement specific rules against misconduct



Rules Against Misconduct



**Violence
and threats**



Rules Against Misconduct



**Disruptive
conduct**



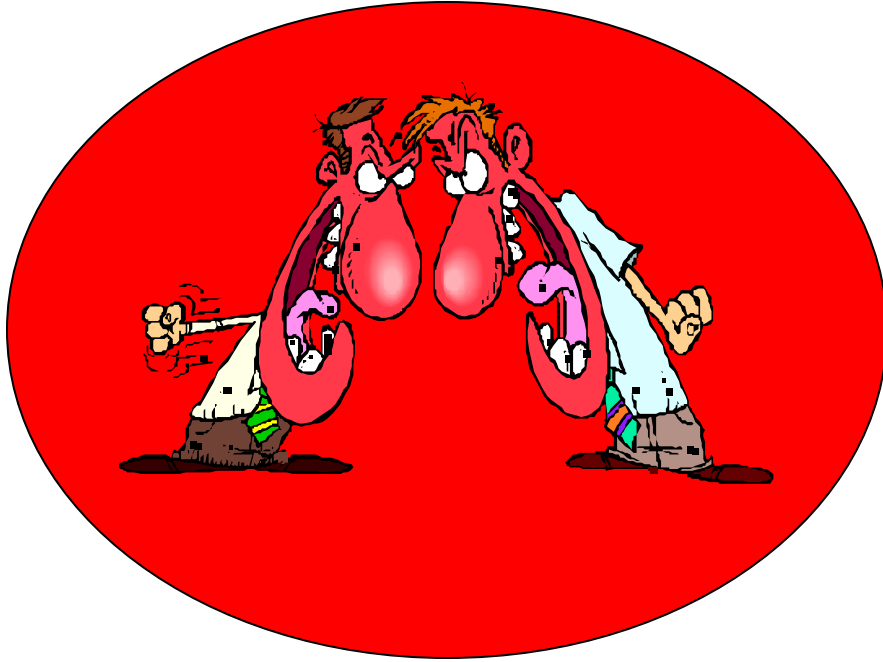
Rules Against Misconduct



Insubordination



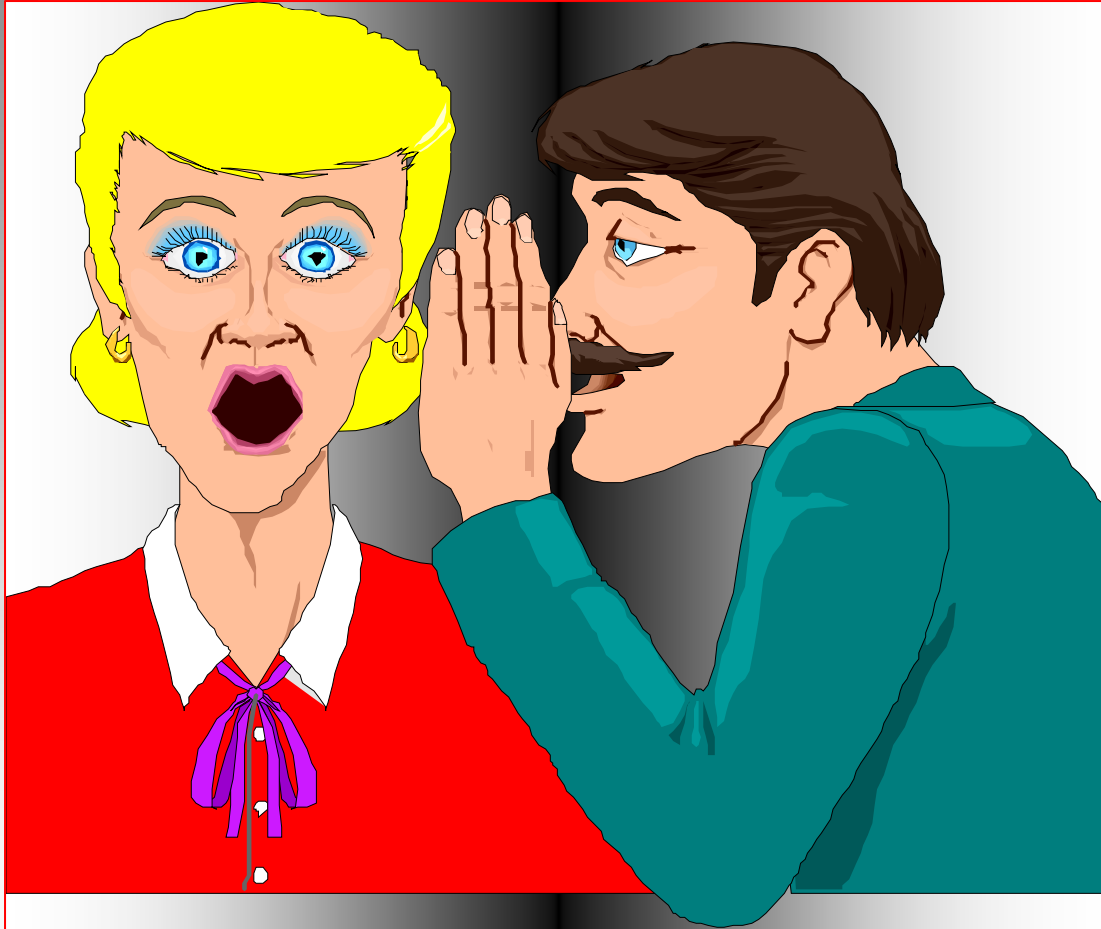
Rules Against Misconduct



**Discourtesy
to customers**



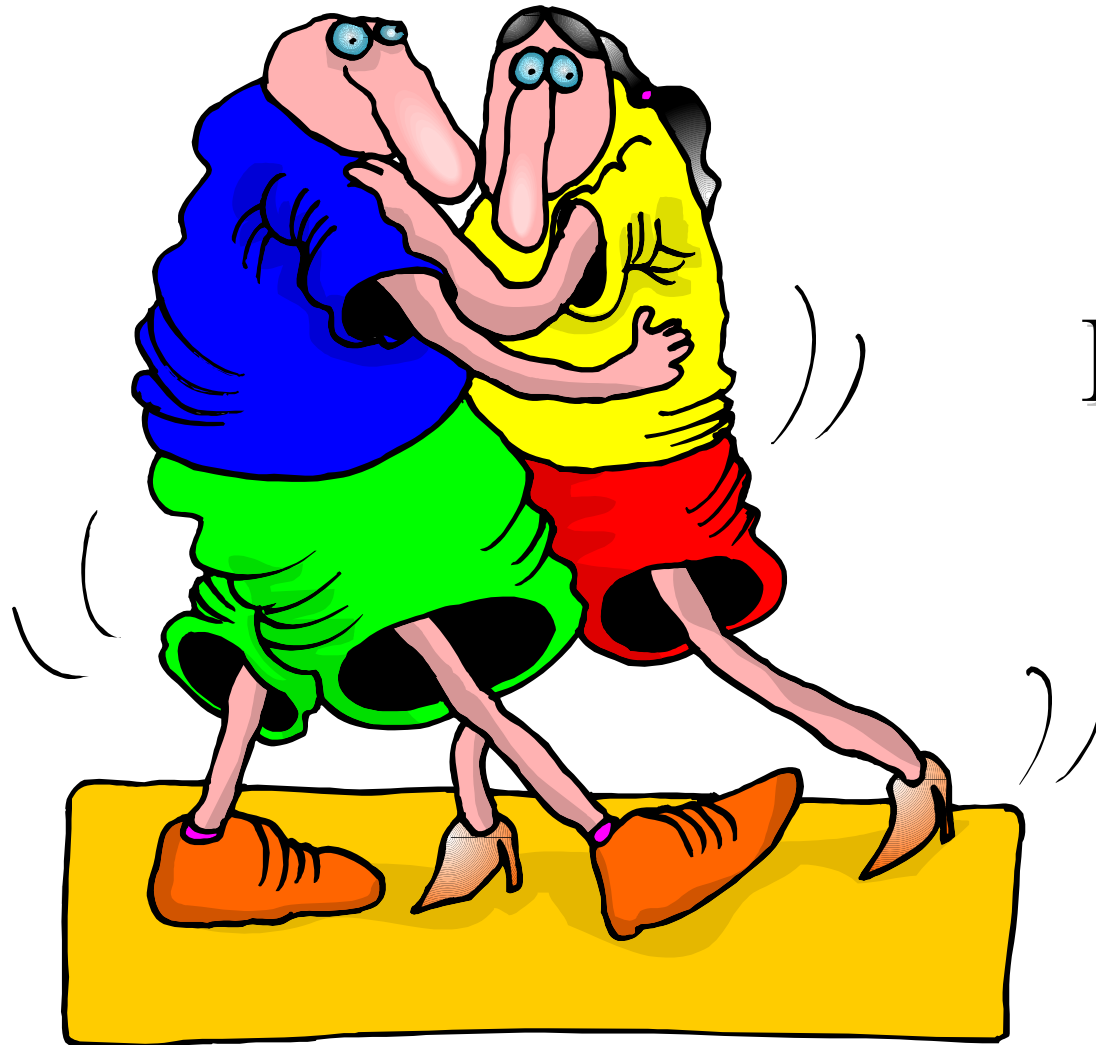
Rules Against Misconduct



Harassment



Rules Against Misconduct



Horse play



Rules Against Misconduct



**Drugs and
alcohol
in the
workplace**



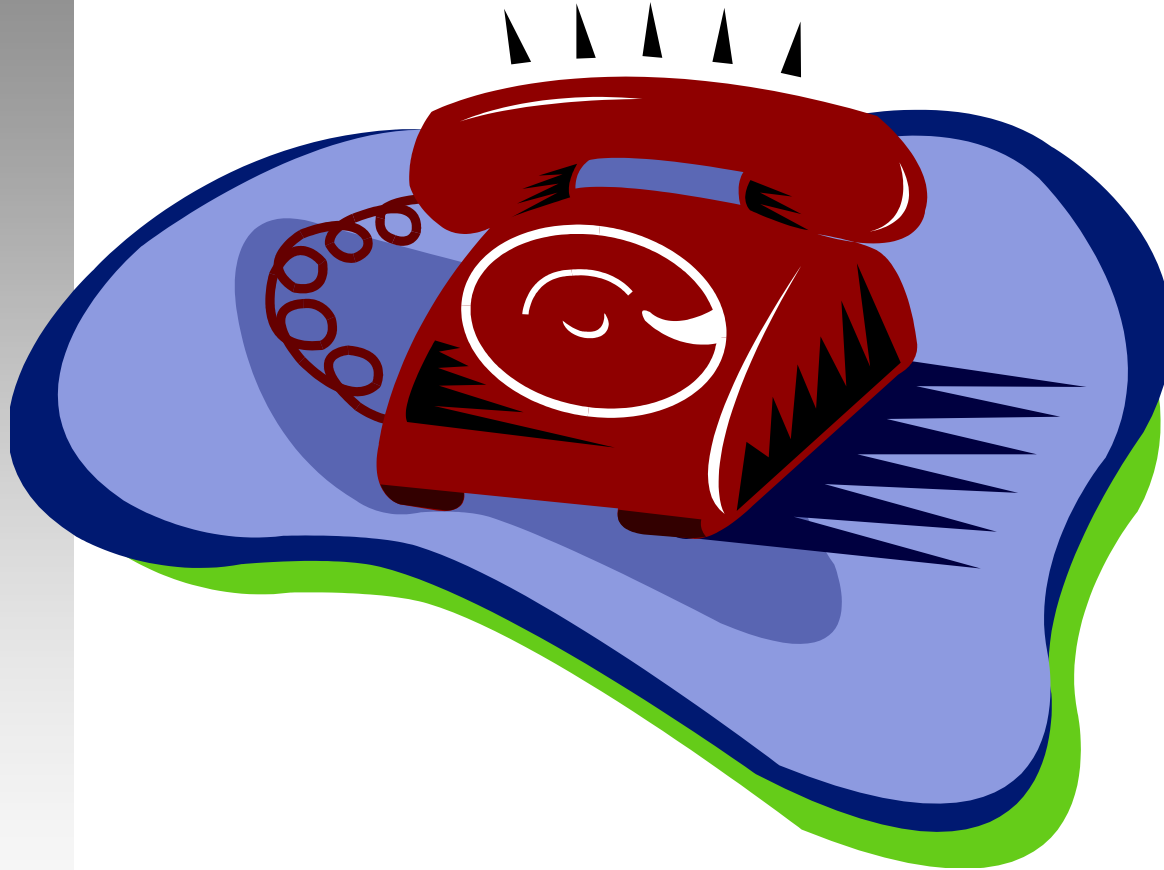
Rules Against Misconduct



Tardiness



Rules Against Misconduct



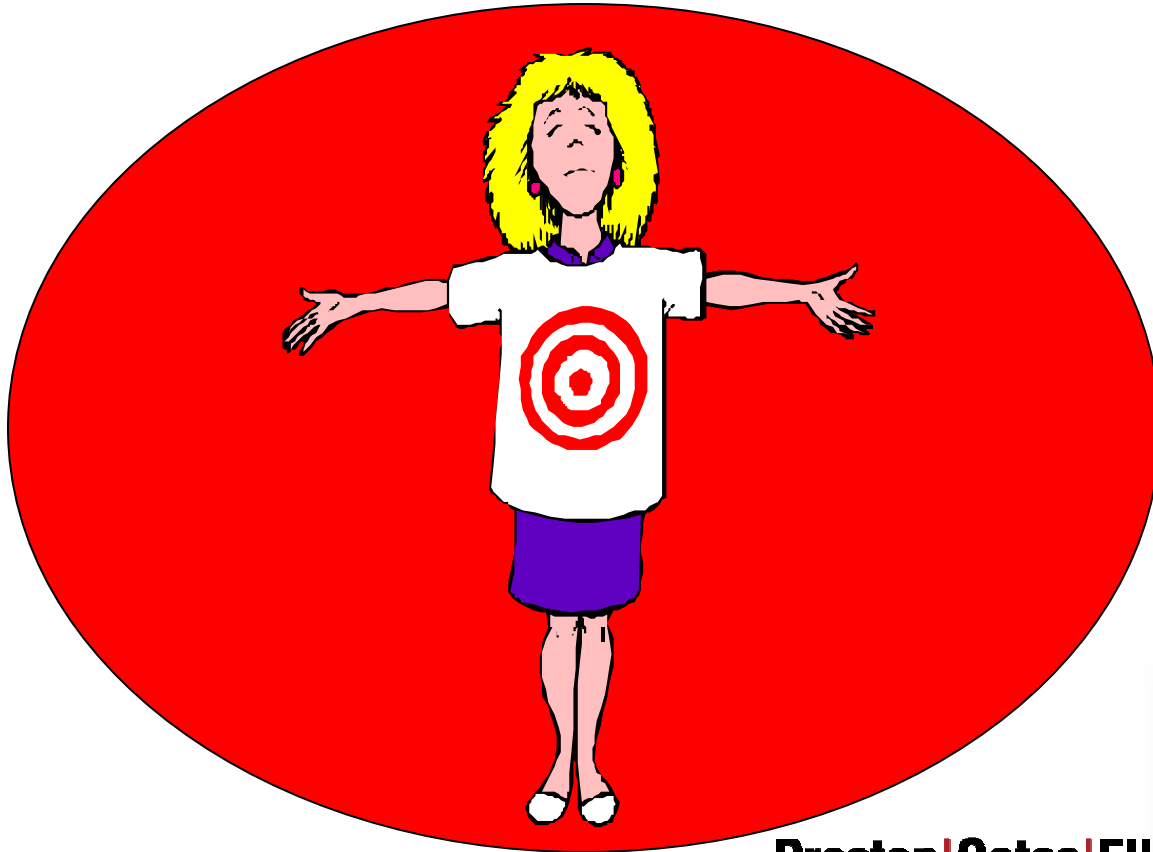
**Failure to
report
absences**



Document poor performance and disciplinary violations promptly...



**...before a problem employee
can claim to be “disabled.”**



Employer must take affirmative steps to accommodate disabled employees



LLP



Document all requests for accommodation and efforts made to accommodate



Persons Protected by Title I of the ADA

What is a
Reasonable Accommodation?



HOW TO “ACCOMMODATE”?

Qualified “with or without”, e.g.

- ✓ Access to facilities
- ✓ Restructuring
- ✓ Reassignment
 - ✓ New EEOC Guidance requires even over better qualified candidate
- ✓ Rescheduling
- ✓ Re-equipping
- ✓ Shadow employees



HOW TO “ACCOMMODATE”?

Reasonable Accommodation versus Undue Hardship

- ✓ Cost
 - ✓ Available tax credit
 - ✓ Outside funding
- ✓ Financial resources
 - ✓ Facility
 - ✓ Corporate-wide
- ✓ Practical impact & sometimes safety



Persons Protected by Title I of the ADA

What Pre-Employment Screening
is Permitted?



PRE-EMPLOYMENT SCREENING

- ✓ Pre-Offer Inquiries
 - ✓ Related to ability to perform job
 - ✓ Related to accommodation required
- ✓ Post-Offer Inquiries
 - ✓ No need for medical test to be related to job, but withdrawal of offer must be
 - ✓ Same test for all applicants for same job
 - ✓ Agility and drug tests not medical tests



The Family Medical Leave Act

Ensure Compliance with the
Family and Medical Leave Act



In evaluating an employee's leave of absence, the first question to ask is whether the employee is eligible for protection under FMLA.



FMLA – Employee Eligibility

- Worked at least 12 (consecutive or non-consecutive) months for the employer
- Worked for the employer at least 1,250 hours during the 12 consecutive months preceding the start of the leave (not the date of the leave request)



Employed at a work site where there are at least 50 employees within a 75-mile radius.

- Test can be met either when leave is requested or when taken.
- Salespeople are deemed to work at their “home base” worksite (where work assignments originate or where they report for work).



The federal FMLA provides up to 12 weeks of unpaid leave for family and medical reasons during a 12 month period.

But, how do you count the 12 months?

- Calendar year
- Forward looking from first leave date
- “Rolling” method***



Leave may be taken for the following reasons

- The employee's own "serious health condition" that involves:
 1. Inpatient care; or
 2. Continuing treatment by a health care provider that involves:
 - A period of incapacity of more than three consecutive days; and
 - Continuing regiment of treatment; or
 - Any period of incapacity due to a chronic serious health condition

Leave may be taken for the following reasons

- To care for the employee's immediate family members with a serious health condition. Immediate family member means:
 1. Spouse (includes common law marriage and, if recognized by state, domestic partner).
 2. Child (must be under 18 or incapable of self-care due to disability).
 3. Employee's parent (not spouse's parent).

Leave may be taken for the following reasons

- For the birth of a son or daughter, and to care for the newborn child.



Intermittent Leaves and Reduced Work Schedules

1. Must be granted if “medically necessary.”
2. Employer has option of switching employee to an alternative position, with an equivalent rate of pay, if it better accommodates recurring periods of leave.
3. If it is medically necessary for employee to be absent every Monday, each absence counts as a single day of leave under FMLA (rather than as a workweek of leave) if the employee otherwise remains in the same job and has no substantial shift in duties.
4. FLSA salaried exempt employees
 - May have salary reduced without jeopardizing the exemption.



Employer Notification Obligations (pre-request)

1. Post the FMLA poster in every worksite, whether or not there are employees at the worksite who are eligible to take FMLA leave.
2. Include FMLA materials in the “Employee Handbook”.



Employer Notification to Employee When Leave Needed

- A. After an employee requests FMLA leave, the employer must notify employees of their rights and obligations during the leave.
- B. Employer must designate the employee's absence as FMLA leave within two business days.
- C. Outside work. Employer must inform employees about the effect on their employment status of outside employment during the leave.



Employer Notification to Employee When Leave Needed

- D. Medical certification/fitness for duty. Employer must inform employees whether they must obtain a medical release before returning to work.
- E. Key employee designation. The employer must designate employees as key employees and follow other procedures, if the employer intends to use the key employee exception.



Employer Notification to Employee When Leave Needed

- F. Substitution of Paid Leave. The employer must notify the employee if it intends to require the employees to utilize available paid leave, such as vacation or sick leave.
- G. Right to Restoration. The employee must be advised of their right to be re-instated to the same or “equivalent position.”
- H. Group Health Benefits. Employees must be advised of their obligation relating to premium payments.



Status Reports

- Employer can require periodic status reports from employees during the leave.
- Employees who clearly indicate that they will not return to work at the end of the leave are considered to have resigned, unless the failure to return involves the continuation of serious health condition or another FMLA qualifying reason.



Medical Certification

- A. Employer can require medical certification for leaves relating to a serious health condition
- B. Fifteen-day deadline. Employee must obtain medical certification within 15 days of being requested by employer or FMLA leave can be postponed.
- C. Second and third opinions. Employer can request second opinion if it has reason to doubt the validity of the medical certification.
- D. Employer must pay for second and third opinions. Employees can be required to pay for medical certification unless the medical plan provides for reimbursement.



Medical Coverage During Leave

- A. Employer FMLA follows its own rules, not the COBRA rules.
- B. Employers must continue the same subsidized medical coverage that is provided to active employees.
- C. Employees have 30 days to pay their share of the cost of coverage, measured from first of month or paycheck date.
- D. Employer can require advance payment of medical premiums before leave begins, if the employer's pre-tax cafeteria plan contains such a requirement.



What about the Employee Who Cannot Return to Work?

- A. Employees who do not return to work when leave expires can be terminated under FMLA.
- B. However, they are protected by civil rights laws, ADA, ADEA, workers comp, state FMLA and other laws. For example, ADA may require extended leave as a “reasonable accommodation,” depending upon the employer’s past practices, the employee’s medical condition, the employee’s expected return date, and other factors.



What if the Employee Can Return to Light Duty?

- A. Employer has no obligation under FMLA to provide light duty, but other laws such as workers compensation or ADA may require light duty.
- B. Employee who is released to light duty cannot be required by the employer to accept light duty work. FMLA allows employees to take full-time leave, which eliminates a useful tool for dealing with workers compensation abuse.



What are an Employee's Rights Upon Return?

- A. Employer must be re-instated to same or “equivalent position.” An “equivalent position” means same duties, skills, prestige, compensation, etc., and will be closely scrutinized.
- B. Employee must be returned with equivalent benefits.
- C. Employees have no greater right to re-instatement than if they had been actively working.



Recommendations to Reduce Workers' Compensation Related Costs

FMLA



1. Train supervisors to take FMLA into account when considering leave requests of all employees, including those injured on the job.
2. All supervisors should understand that, in certain circumstances, FMLA leave and workers' compensation leave may run concurrently.
3. Coordinate FMLA leave with workers' compensation leave and other leave policies to avoid "stacking."
4. Review light duty policies for legality and limit them to a temporary basis.



5. Remember that you may not obtain an FMLA second opinion from a workers' compensation doctor you normally use in many cases.
6. Create a paper trail to show that written notice is provided to employees regarding the employee's obligations when requesting FMLA leave, and other aspects of FMLA compliance.
7. Make sure that the employee has received written notice regarding your designation of leave as FMLA leave

8. Provide employees with guidance; you must include the FMLA policy in your employee handbook – if you have no handbook, you must provide written notice each time an employee has a qualifying event.
9. Be aware of confidentiality issues – train supervisors when to send employees to Human Resources rather than make further inquiries – ensure information is treated confidentially.



10. Remember to rely upon medical opinions, not those of a layperson, to make decision.
11. Make sure an FMLA poster is displayed.



Recommendations to Reduce Workers' Compensation Related Costs

ADA



ADA

1. Train supervisors to understand the basic principles behind the ADA.
2. Supervisors must be aware of responsibilities with respect to hiring and reasonable accommodations for applicants and employees.
3. Make employment decisions based on an understanding of the abilities of persons with impairments; do not focus solely on their limitations.
4. Do not rely solely on workers' comp evaluations to make return-to-work decisions, since they focus on impairment and loss of function.
5. Carefully draft job descriptions and define essential job functions.

**Recommendations to Reduce
Workers' Compensation Related Costs**

**Workers'
Compensation**



1. Issue FMLA notice in appropriate cases of on-the-job injuries with lost work days (avoid stacking).
2. Exercise your right to early control of medical treatment.
3. Advise workers' comp doctors of FMLA and ADA implications
4. Track time off on workers' compensation claims against FMLA
5. Aggressively attack fraudulent claims



6. Be aware of the broad rights of injured workers to return to their former jobs.
7. Ensure that leave of absence procedures are in writing and communicated to employees.
8. Establish and enforce reporting requirements.
9. Ensure that employees are evaluated on an individual basis in deciding whether to grant leave, allow their return, or terminate them.



Thank you for your time!

**Questions?
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