

HIRING, RETURN TO WORK AND TERMINATION

MANAGING THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE

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MANAGING THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE

Presented by

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HIRING

MAKE ME AN OMELET

“When I'm hiring a cook for one of my restaurants, and I want to see what they can do, I usually ask them to make me an omelet.”

- **Bobby Flay**, Chef / Restaurateur



N.C. Gen. Stat. § 97-12.1 Willful misrepresentation in applying for employment.

No compensation shall be allowed under this Article for injury by accident or occupational disease if the employer proves that (i) at the time of hire or in the course of entering into employment, (ii) at the time of receiving notice of the removal of conditions from a conditional offer of employment, or (iii) during the course of a post-offer medical examination:

1. The employee knowingly and willfully made a false representation as to the employee's physical condition;
2. The employer relied upon one or more false representations by the employee, and the reliance was a substantial factor in the employer's decision to hire the employee; and
3. There was a causal connection between false representation by the employee and the injury or occupational disease.

For the employee to be barred from receiving benefits, the employer must show the misrepresentation occurred

- (1) at the time of hire;
- (2) at the time of receiving notice of the removal of conditions from a conditional offer of employment; or
- (3) during the course of a post-offer medical examination. It is also important to note that other employment issues and considerations may come into play, such as the Americans with Disabilities Act, which can also affect the hiring process.

The misrepresentation defense is “an affirmative defense.” It is the employer’s responsibility to plead the defense and the employer must prove by the greater weight of the evidence that the misrepresentation occurred and that it is causally related to the subsequent accident.

BEST PRACTICE

(1) Prepare accurate Job Descriptions detailing with specificity the essential functions and physical demands of their positions.

This provides the employee with detailed information about the offered position and documents the communications between employee and employer. The employer should have the prospective employee sign off on the job description, confirming the employee's understanding of the requirements and functions of the position, as well as the employee's affirmative representation that the employee is physically capable of performing the essential functions of the job, with or without reasonable accommodation.

(2) Implement Post-Offer, Pre-Hire Questionnaires.

The employer may inquire into areas such as prior work injuries, medication usage, work restrictions, surgeries, and permanent disability ratings. The questionnaire is utilized after a conditional offer of employment has been extended. Employer and employee should be cognizant of the fact that the successful completion of the Post-Offer, Pre-Hire Questionnaire is a condition precedent to the employment offer being finalized.

(3) Implement Post-offer, Pre-Hire Physicals to determine the employee's fitness for duty.

Pre-hire physical is conducted after a conditional offer of employment has been extended. Employer and employee should be cognizant of the fact that successful completion of the Post-Offer, Pre-Hire Physical is a condition precedent to employment being finalized.

- The employer must prove by the greater weight of the evidence that the misrepresented or undisclosed physical condition increased the employee's risk for injury and that the employer relied upon the misrepresentation.
- The misrepresentation and the subsequent injury must involve the same body part.
- *Purcell v. Friday Staffing*, 235 N.C. App. 342, 761 S.E.2d 694 (2014), one of the earliest cases to tackle the misrepresentation defense, continues to provide the best insight into its application. The case outlines the responsibilities of the employer and the employee and what the Commission/Court will be looking for when it has to decide the issue.

RETURN TO WORK

COME BACK AND MAKE
MORE OMELETS

(WITH OR WITHOUT A
SOUS-CHEF)

N.C. Gen. Stat. § 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

If an injured employee refuses suitable employment as defined by G.S. 97-2(22), the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. Any order issued by the Commission suspending compensation pursuant to G.S. 97-18.1 on the ground of an unjustified refusal of an offer of suitable employment shall specify what actions the employee should take to end the suspension and reinstate the compensation. Nothing in this Article prohibits an employer from contacting the employee directly about returning to suitable employment with contemporaneous notice to the employee's counsel, if any.

Peoples v. Cone Mills Corp.



- “Unique opportunity” to return to employment. The supply room job that the employer offered to the employee did not require the employee to “lift [any object];” it did not require the employee to “engage in any physical activity of which he [did] not feel capable;” and it was part-time, allowing the employee to work “only the number of hours he desires and [the employee was] not required to work if he [did] not feel like doing so.”
- The Court concluded that “Cone has so modified the supply room position . . . that the position would not be offered in the competitive job market.”
- “The Workers' Compensation Act does not permit Cone to avoid its duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which Cone could terminate at will or, as noted above, for reasons beyond its control.”

As a result of the Workers' Compensation Reform Act of 2011, "suitable employment" is now defined by N.C. Gen. Stat. § 97-2(22), whereas it was previously defined by the North Carolina Rehabilitation Rules spiced with often confusing case law. Specifically, N.C. Gen. Stat. § 97-2(22) provides,

Suitable employment. – The term "suitable employment" means employment offered to the employee or, if prohibited by the Immigration and Nationality Act, 8 U.S.C. § 1324a, employment available to the employee that (i) prior to reaching maximum medical improvement is within the employee's work restrictions, including rehabilitative or other noncompetitive employment with the employer of injury approved by the employee's authorized health care provider or (ii) after reaching maximum medical improvement is employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience and is located within a 50-mile radius of the employee's residence at the time of injury or the employee's current residence if the employee had a legitimate reason to relocate since the date of injury. No one factor shall be considered exclusively in determining suitable employment.

For pre-MMI employment to be suitable the employment must be:

1. With the employer of injury;
2. Within the light-duty work restrictions - which means it can be modified and it can be “make work” or non-competitive employment; and
3. Approved by the authorized treating physician.

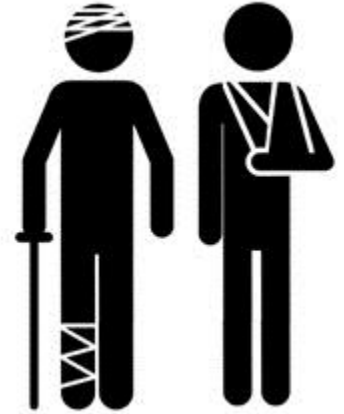


For post-MMJ suitable employment, there is a multifactorial analysis, and no one factor is exclusively controlling. The factors the Industrial Commission considers are:

1. The claimant's pre-existing conditions;
2. The claimant's work restrictions;
3. The claimant's vocational skills, education and experience;
 - within a 50 mile radius of the employee's residence at the time of the injury or current residence if the employee had a legitimate reason to move.

Pre-MMI Suggestions

- Answering the telephone
- Filing paperwork
- Taking inventory (but not physically moving inventory)
- Tool room/storage checkout
- Placing purchase orders by phone, fax, e-mail, etc.
- Shredding documents
- Customer appreciation phone calls, telephone sales calls, dispatch assistant
- Greeter/receptionist/front desk assistant
- Computer data entry work or computer training
- Collating printed materials
- Packaging/light assembly of product or merchandise
- Outgoing mail stuffing, applying postage
- Incoming mail opening, mail bin distribution
- Making photocopies
- Light stocking of supplies for bathrooms/kitchen areas
- Perform safety inspections and/or ensure employees are wearing the appropriate safety equipment
- Teacher/instructor (many times injured experienced employees may be able to return to work teaching less experienced employees)
- Light food preparation that can be performed sitting down
- Light surface cleaning, counters, phones, and computers etc.



Vocational Rehabilitation

- If the injured employee has not returned to work or has returned to work earning less than 75% of the preinjury wage, the employee may request vocational rehabilitation. It is important to note that the 75% wage threshold for vocational rehabilitation does not necessarily indicate that the offered employment is unsuitable, as the employee has the right to receive TPD.
- Vocational rehabilitation may include education/retraining in the North Carolina community college or university system. However, the education/retraining must be reasonably likely to substantially increase the employee's post-education wages. Vocational rehabilitation may also commence before the employee reaches MMI.
- If vocational rehabilitation is determined to be necessary, the employer has the right to make the initial selection, but at any time either party may request a change in the rehabilitation counselor for good cause.
- The parties have a responsibility to ensure that vocational rehabilitation compliance occurs and the employer has the right to seek compliance by obtaining an order from the Industrial Commission and/or subsequently filing a Form 24 Application to Suspend Benefits if compliance still does not occur.

TERMINATION

NO ONE CAN EAT YOUR
OMELETS

North Carolina is “at will.” This means that an employer is free to terminate an employee for any reason or no reason at all. There are exceptions to the at-will rule. The most common exceptions include:

- An employment contract that sets out the terms and conditions of employment and limits an employer’s ability to fire the employee at will.
- A termination that violates federal and state employment statutes prohibiting discrimination or retaliation. Age, Disability or injury rating, Sex (including sexual harassment), Pregnancy, Ethnicity or national origin, Race or skin color, Genetic information, Religion.
- A termination that violates a particular public policy.

Seagraves v. Austin Co. of Greensboro

Where an injured worker returns to suitable employment and is subsequently terminated for cause, the injured worker may be deemed to have constructively refused suitable employment and not entitled to a resumption of indemnity benefits.

In order to prove constructive refusal of suitable employment, the employer must prove :

- that the employee was terminated for misconduct;
- that the same misconduct would have resulted in the termination of a non-disabled employee; and
- that the termination was unrelated to the injured worker's compensable injury.

Note: If the injured employee proves a valid and reasonable effort to find alternative suitable employment which was unsuccessful due to limitations or restrictions flowing from the compensable at-work accident, the employer may have to reinstate benefits. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 597 S.E.2d 695 (2004).

HIRING:

- Responsibility rests upon the employer to (1) outline the position being offered and its essential functions and (2) inquire about the employee's ability to perform the position.
- Responsibility rests on the employee to voice any limitations they might have in performing the essential functions of the position.

TERMINATION OF A RECUPERATING EMPLOYEE:

- Responsibility rests upon an employer to prove that the recuperating employee is being treated the same as any other employee in the company.
- Responsibility rests upon the employee to ensure that the employer is aware of any limitations the employee may have during the period of recuperation.

Following are two Industrial Commission cases outlining the parties' responsibilities:

Thomas v. CenturyLink,

IC No. X58430
(filed September 9, 2013)

Employee suffered an at-work injury but later returned to work for employer. Approximately one year after the accident, employee was terminated for failing to follow his assigned work schedule. Employee filed for benefits, alleging that his failure to follow the work schedule was due to his closed head injury. The employer provided the Commission with documentation of ongoing and progressive counseling and discipline of employee regarding his failure to adhere to the assigned work schedule.

Conversely, there was no evidence that employee had ever informed employer that his difficulty in following the schedule was related to a head injury or medication.

The Commission upheld employer's denial of benefits finding that employee was terminated for reasons any non-injured employee would have been terminated.

Braswell v. Case Farms, Inc.,

IC No. Y09998
(filed December 15, 2016)

Employee sustained a compensable work injury to her hand which required medications prescribed by the treating physician, one of which came with a warning to stay away from heated areas. Prior to reaching MMI, employee returned to work for employer in her pre-injury job, but complained that her job was too difficult for her to perform given the persistent pain in her hand. As a result, the employer moved employee to another job within an area of the plant known as the kiln.

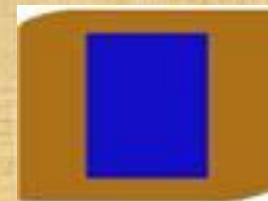
Employee tried explaining to her manager that she was not supposed to be working in heated areas while taking the medication. Notwithstanding her explanations she was kept in the kiln area where it reportedly got to 100°. After working for roughly 2 hours she felt as though her “head was exploding” and became sick to her stomach, so she went to the company nurse. Employee informed the nurse that she could no longer work in the kiln area because it was making her sick. One of the managers who attended that meeting with the nurse told employee to go back into the kiln. Instead, employee turned in her ID card and left for the day.

The next day, employee called in to work and reported that she would not be coming in because she was still experiencing headaches, chest pain, and difficulty with breathing. In response, employer informed her that she no longer had a job. Employee later found employment elsewhere and sought benefits for the time she was out of work. Employer denied the claim on the grounds that employee had voluntarily quit her job.

The Full Commission ruled that employee had not been treated like any other employee but rather, that she was not able to perform her assigned job duties with the employer due to her work-related injury and resulting medical treatment, and that employee was terminated from her pre-injury position due to conditions related to her compensable injury.

MANAGING LEAVES OF ABSENCE

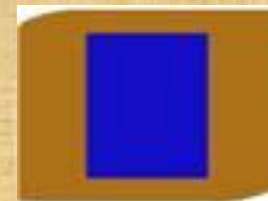
22ND ANNUAL NC WORKERS' COMPENSATION EDUCATIONAL CONFERENCE
OCTOBER 4, 2017



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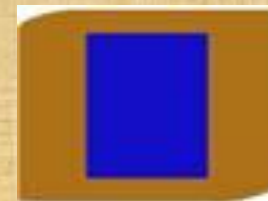
GOOD OLD DAYS

- ABSENT EMPLOYEE SUBJECT TO THE EMPLOYER'S GRACE
- NO REGULATION GOVERNING EMPLOYEE ABSENCES



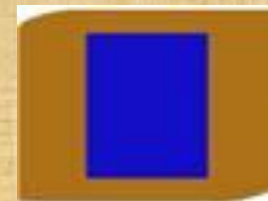
INITIAL REGULATION

- STATES ENACTED WORKERS' COMPENSATION LAWS
- EXCLUSIVE REMEDY FOR WORKPLACE ACCIDENTS
- BENEFITS PAID FOR INJURIES AND ILLNESS ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT
- NO REINSTATEMENT RIGHT; PROHIBITION AGAINST DISCRIMINATION AND RETALIATION



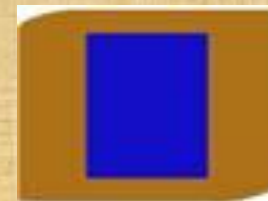
FEDERAL LAWS

- THE REHABILITATION ACT OF 1974
- THE AMERICANS WITH DISABILITIES ACT OF 1990
- THE FAMILY AND MEDICAL LEAVE ACT OF 1993



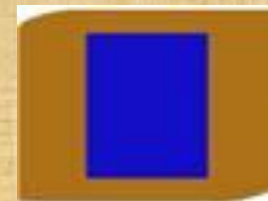
STATE LAWS

- LITTLE ADAs, LIKE NORTH CAROLINA'S "HANDICAPPED" PERSONS PROTECTION ACT
- LITTLE FMLAs, LIKE NORTH CAROLINA'S SCHOOL LEAVE LAW



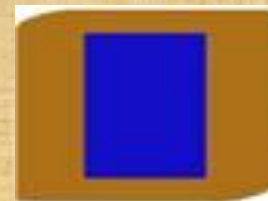
PRIVATE LEAVE BENEFITS (AND FEDERAL REGULATION)

- VACATION
- PERSONAL LEAVE OF ABSENCE/SICK DAYS/PERSONAL TIME OFF
- SHORT-TERM DISABILITY
- LONG-TERM DISABILITY
- ERISA



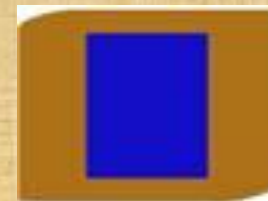
ALPHABET HEADACHE

- ADA
- DPPA
- ERISA
- FMLA
- LTD
- OSHA
- P&P
- REDA
- STD
- WC



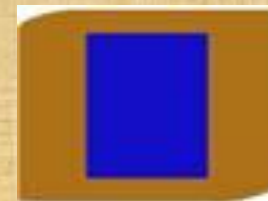
ESSENTIAL COMPONENTS TO MANAGING LEAVE

- WORKING KNOWLEDGE OF APPLICABLE LAWS
- MESH THESE LEGAL OBLIGATIONS INTO YOUR POLICIES
- IDENTIFY PARTNERS IN LEAVE MANAGEMENT
- ASSIGN SPECIFIC RESPONSIBILITIES
- CREATE TEMPLATES AND CHECKLISTS
- TRAIN AND EDUCATE ALL STAKEHOLDERS



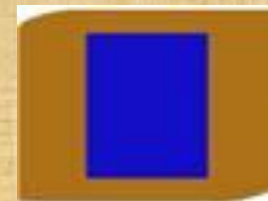
STEP 1 – START WITH THE FMLA

- IS YOUR COMPANY A “COVERED EMPLOYER?”
 - A COVERED EMPLOYER EMPLOYS 50+ EMPLOYEES
- IF YOUR COMPANY IS NOT A “COVERED EMPLOYER,” CONSIDER WHETHER:
 - THE EMPLOYEE IS ENTITLED TO A REASONABLE ACCOMMODATION UNDER THE ADA
 - IS THE EMPLOYEE “DISABLED” WITHIN THE MEANING OF THE ADA?
 - IS THE REQUESTED LEAVE OF ABSENCE A REASONABLE ACCOMMODATION?
 - THE EMPLOYEE IS SEEKING A LEAVE OF ABSENCE BECAUSE OF A WORK-RELATED INJURY



STEP 2

- HAS A REQUEST FOR LEAVE BEEN MADE?
- TRAIN SUPERVISORS TO RECOGNIZE FMLA-QUALIFYING SITUATIONS
- CREATE REQUEST FORM AND REQUIRE ITS COMPLETION



STEP 3

- IS THE EMPLOYEE ELIGIBLE FOR LEAVE?

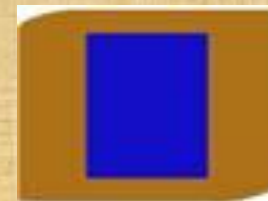
- HAVE YOU EMPLOYED HIM FOR AT LEAST 12 MONTHS AND HAS HE WORKED FOR YOU FOR AT LEAST 1,250 HOURS IN THE PRECEDING 12 MONTHS?

- DOES HE WORK AT A FACILITY WHERE YOU EMPLOY 50 OR MORE WORKERS WITHIN 75 MILES?



STEP 4

- DOES THE EMPLOYEE NEED THE LEAVE FOR A REASON THAT QUALIFIES UNDER THE FMLA?
 - BIRTH AND/OR CARE OF HER NEW CHILD
 - THE PLACEMENT OF A CHILD WITH HER FOR ADOPTION OR FOSTER CARE
 - CARE FOR HER SPOUSE, CHILD OR PARENT WHO HAS A SERIOUS HEALTH CONDITION
 - RECOVERY FROM HER OWN SERIOUS HEALTH CONDITION



STEP 4, CONTINUED

- WHAT IS A “SERIOUS HEALTH CONDITION” UNDER THE FMLA?
 - LEAVE FOR INPATIENT CARE AND ANY ABSENCE IN CONNECTION WITH THAT INPATIENT CARE
 - CONTINUING TREATMENT BY A HEALTH CARE PROVIDER THAT INCLUDES:
 - A PERIOD OF INCAPACITY OF MORE THAN THREE CALENDAR DAYS AND ANY SUBSEQUENT TREATMENT OR PERIOD OF INCAPACITY RELATED TO THAT SAME CONDITION THAT ALSO INVOLVES:
 - TREATMENT TWO OR MORE TIMES BY A HEALTH CARE PROVIDER
 - TREATMENT AT LEAST ONCE BY A HEALTH CARE PROVIDER THAT RESULTS IN A REGIMEN OF CONTINUING TREATMENT UNDER THE SUPERVISION OF THE HEALTH CARE PROVIDER
- ANY PERIOD OF INCAPACITY DUE TO PREGNANCY, OR FOR PRENATAL CARE



STEP 4, CONTINUED

- WHAT IS A “SERIOUS HEALTH CONDITION” UNDER THE FMLA?
 - ANY PERIOD OF INCAPACITY DUE TO A CHRONIC SERIOUS HEALTH CONDITION THAT:
 - REQUIRES PERIODIC VISITS OR TREATMENT BY A HEALTH CARE PROVIDER
 - CONTINUES OVER AN EXTENDED PERIOD OF TIME
 - MAY CAUSE EPISODIC RATHER THAN A CONTINUING PERIOD OF INCAPACITY, SUCH AS ASTHMA OR DIABETES



STEP 4, CONTINUED

- WHAT IS A “SERIOUS HEALTH CONDITION” UNDER THE FMLA?

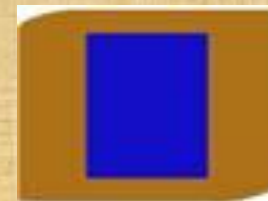
- A PERIOD OF INCAPACITY WHICH IS PERMANENT OR LONG-TERM DUE TO A CONDITION FOR WHICH TREATMENT MAY NOT BE EFFECTIVE

- ANY PERIOD OF INCAPACITY TO RECEIVE MULTIPLE TREATMENTS BY A HEALTH CARE PROVIDER



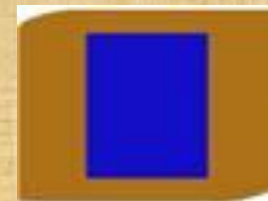
STEP 5

- REQUEST THAT THE EMPLOYEE RETURN A COMPLETED CERTIFICATE OF HEALTH CARE PROVIDER
- REVIEW IT TO DETERMINE WHETHER IT HAS BEEN FILLED OUT COMPLETELY
- DETERMINE WHETHER THE CERTIFICATE IS ACCEPTABLE, OR WHETHER A SECOND OPINION WILL BE REQUIRED



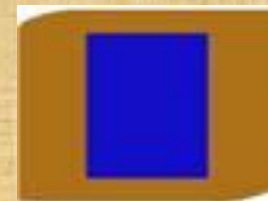
STEP 6

- DECIDE WHETHER TO GRANT, “PRELIMINARILY” DESIGNATE, OR DENY THE LEAVE AS BEING COVERED BY THE FMLA
- SET BASELINE AND TRACK ABSENCE
 - WHO IS ON FMLA LEAVE?
 - HOW MUCH FMLA LEAVE HAS SHE USED?
 - WHEN DOES HER FMLA LEAVE EXPIRE?
 - WHEN ARE PERIODIC REPORTS DUE?
- STACK PAID LEAVE DURING UNPAID FMLA LEAVE
- INFORM EMPLOYEE OF DECISION, ITS CONSEQUENCES, AND HER RESPONSIBILITIES



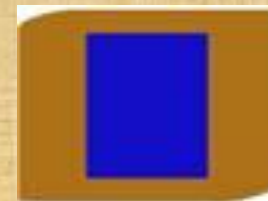
STEP 7

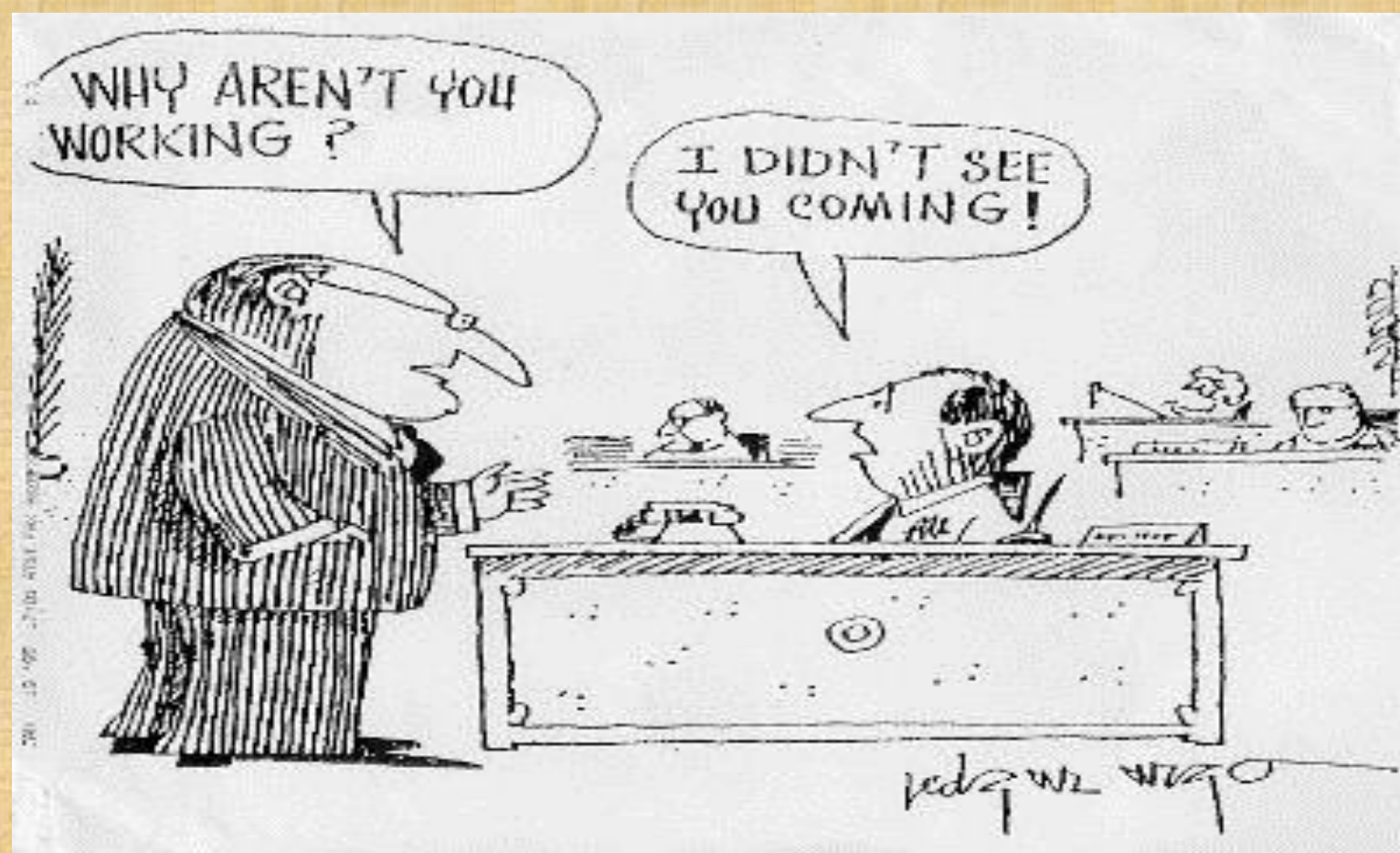
- ARRANGE FOR THE EMPLOYEE'S GROUP HEALTH INSURANCE BENEFITS TO BE CONTINUED DURING THE LEAVE
- ADDRESS AFFECT OF LEAVE ON OTHER BENEFITS



STEP 8

- IF AN EMPLOYEE IS READY TO RETURN TO WORK AT OR BEFORE EXHAUSTING HIS FMLA LEAVE ENTITLEMENT, THEN REINSTATE HIM TO THE SAME OR A SUBSTANTIALLY EQUIVALENT JOB
- CONDITION RETURN TO WORK ON A FITNESS-FOR-DUTY CERTIFICATE, CONSIDER FCE IN SOME CASES





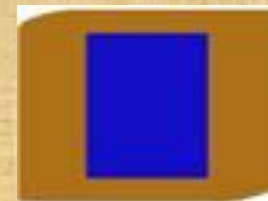
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REINSTATEMENT

- MAY YOU DISCHARGE AN EMPLOYEE WHILE HE IS ON FMLA LEAVE OR WHEN HE IS READY TO BE REINSTATED?

- YES, IF YOU WOULD DISCHARGE OTHER EMPLOYEES FOR THE SAME MISCONDUCT EVEN IF THEY WERE NOT USING FMLA LEAVE.

- YES, IF YOU ELIMINATE THE JOB THROUGH A RIF OR OTHER ORGANIZATIONAL CHANGE WHILE THE EMPLOYEE IS ON FMLA LEAVE. THE EMPLOYEE HAS NO GREATER RIGHT TO REINSTATEMENT THAN IF HE HAD BEEN CONTINUOUSLY EMPLOYED DURING THE FMLA LEAVE PERIOD.



DECISION TREE

ELIGIBILITY

LENGTH OF LEAVE

QUALIFICATIONS/CONDITIONS OF LEAVE

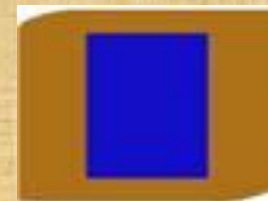
RETURN TO WORK



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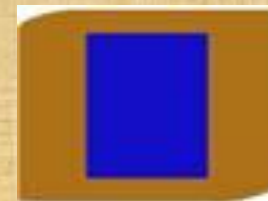
WHO IS PROTECTED UNDER THE ADA?

- THE ADA PROTECTS QUALIFIED INDIVIDUALS WITH DISABILITIES
- A PERSON HAS A DISABILITY IF HE:
 - HAS A PHYSICAL OR MENTAL IMPAIRMENT THAT SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY WHEN USING A MITIGATING MEASURE,
 - HAS A RECORD OF A SUBSTANTIALLY LIMITING IMPAIRMENT, AND
 - IS REGARDED AS HAVING A SUBSTANTIALLY LIMITING IMPAIRMENT



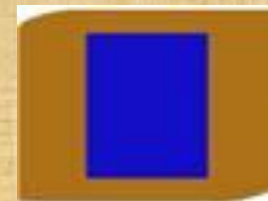
WHO IS PROTECTED? (CONTINUED)

- A QUALIFIED EMPLOYEE MUST:
 - SATISFY YOUR JOB REQUIREMENTS FOR EDUCATIONAL BACKGROUND, EMPLOYMENT EXPERIENCE, SKILLS, LICENSES, AND ANY OTHER QUALIFICATION STANDARDS THAT ARE JOB RELATED; AND
 - BE ABLE TO PERFORM THOSE TASKS THAT ARE ESSENTIAL TO THE JOB, WITH OR WITHOUT REASONABLE ACCOMMODATION



WHAT ARE MY OBLIGATIONS TO PROVIDE REASONABLE ACCOMMODATIONS?

- REASONABLE ACCOMMODATION MAY INCLUDE:
 - JOB RESTRUCTURING
 - PART-TIME OR MODIFIED WORK SCHEDULES
 - REASSIGNMENT TO A VACANT POSITION
 - ADJUSTING OR MODIFYING EXAMINATIONS, TRAINING MATERIALS OR POLICIES
 - PROVIDING READERS AND INTERPRETERS
 - MAKING THE WORKPLACE READILY ACCESSIBLE TO, AND USABLE BY, PEOPLE WITH DISABILITIES



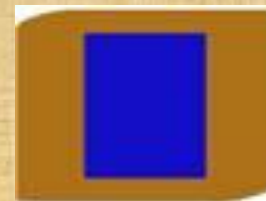
QUESTIONS?

BARRETT LAW OFFICES INFORMATION

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