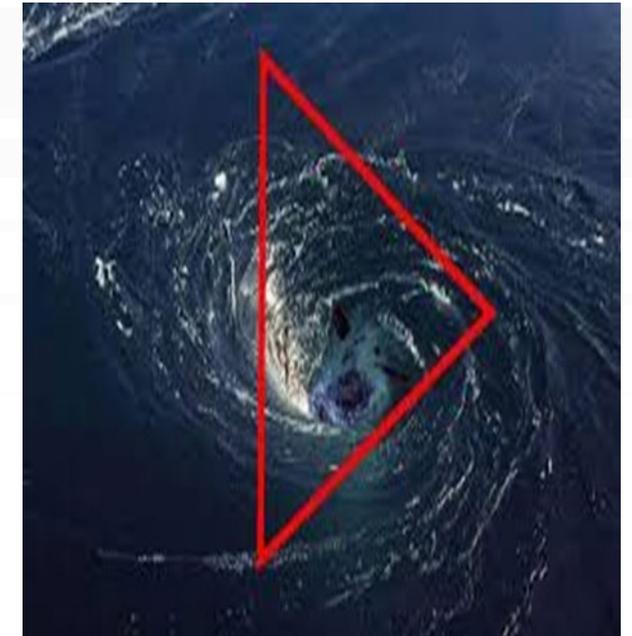


The Bermuda Triangle: Where the ADA, FMLA, and Workers Comp all meet



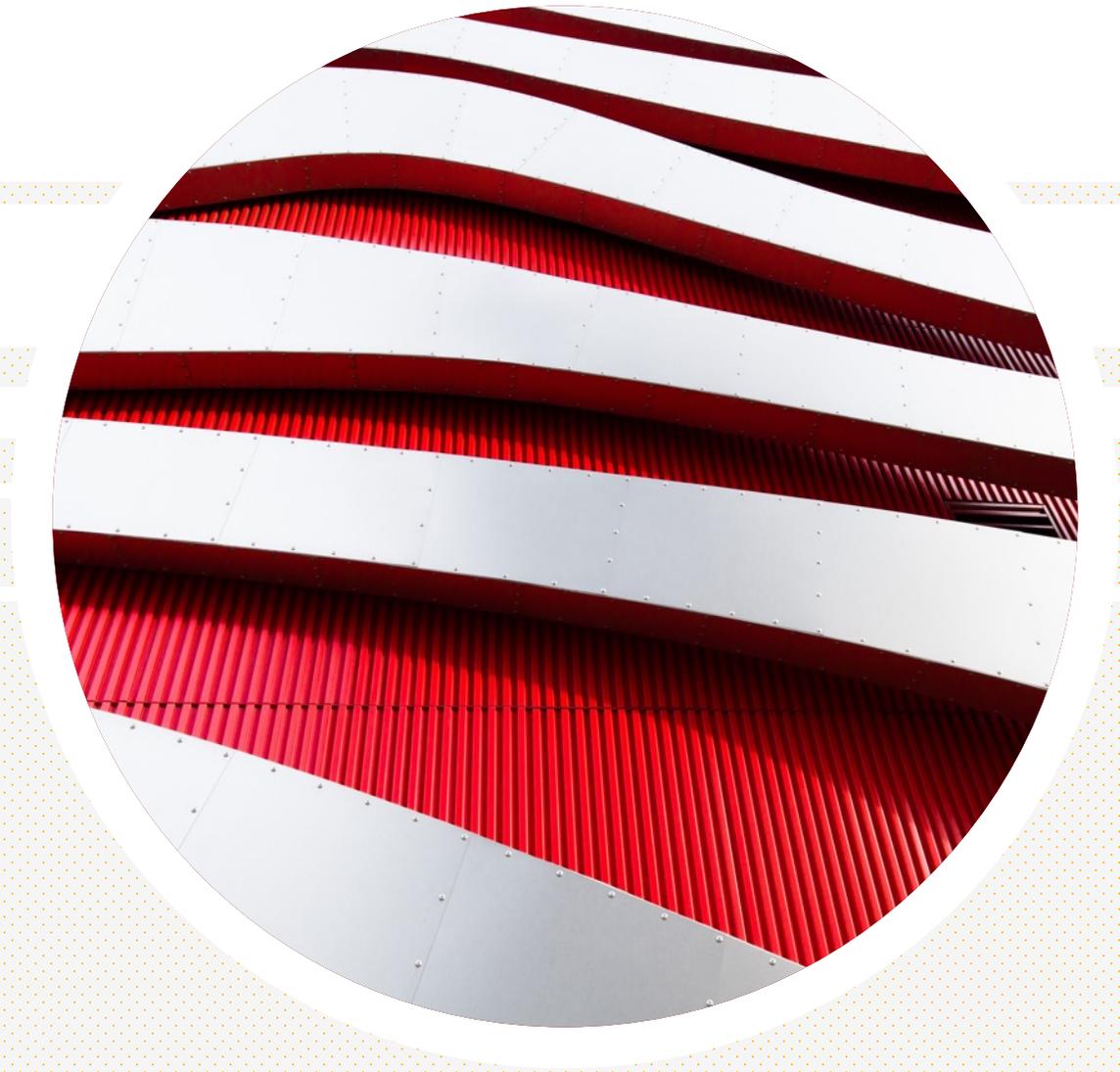
The term is not original . . .

A screenshot of a Google search page. The search bar contains the text "the bermuda triangle of fmla ada and workers comp". Below the search bar, there are tabs for "All", "News", "Images", "Videos", "Maps", "More", "Settings", and "Tools". The search results show "About 7,930 results (0.55 seconds)". The first result is titled "The Bermuda Triangle for employers: Navigating ADA, FMLA and ..." with a URL from bizjournals.com. The second result is titled "Bermuda Triangle: Where FMLA, ADA, and Workers' Compensation ..." with a URL from npelra.org. The third result is titled "'The Bermuda Triangle' ADA-FMLA-Workers' Comp Quiz ..." with a URL from constangy.com. The fourth result is titled "Interplay of ADA, FMLA and Workers' Compensation - SHRM" with a URL from shrm.org. The Windows taskbar is visible at the bottom of the screenshot, showing the search bar and various application icons.



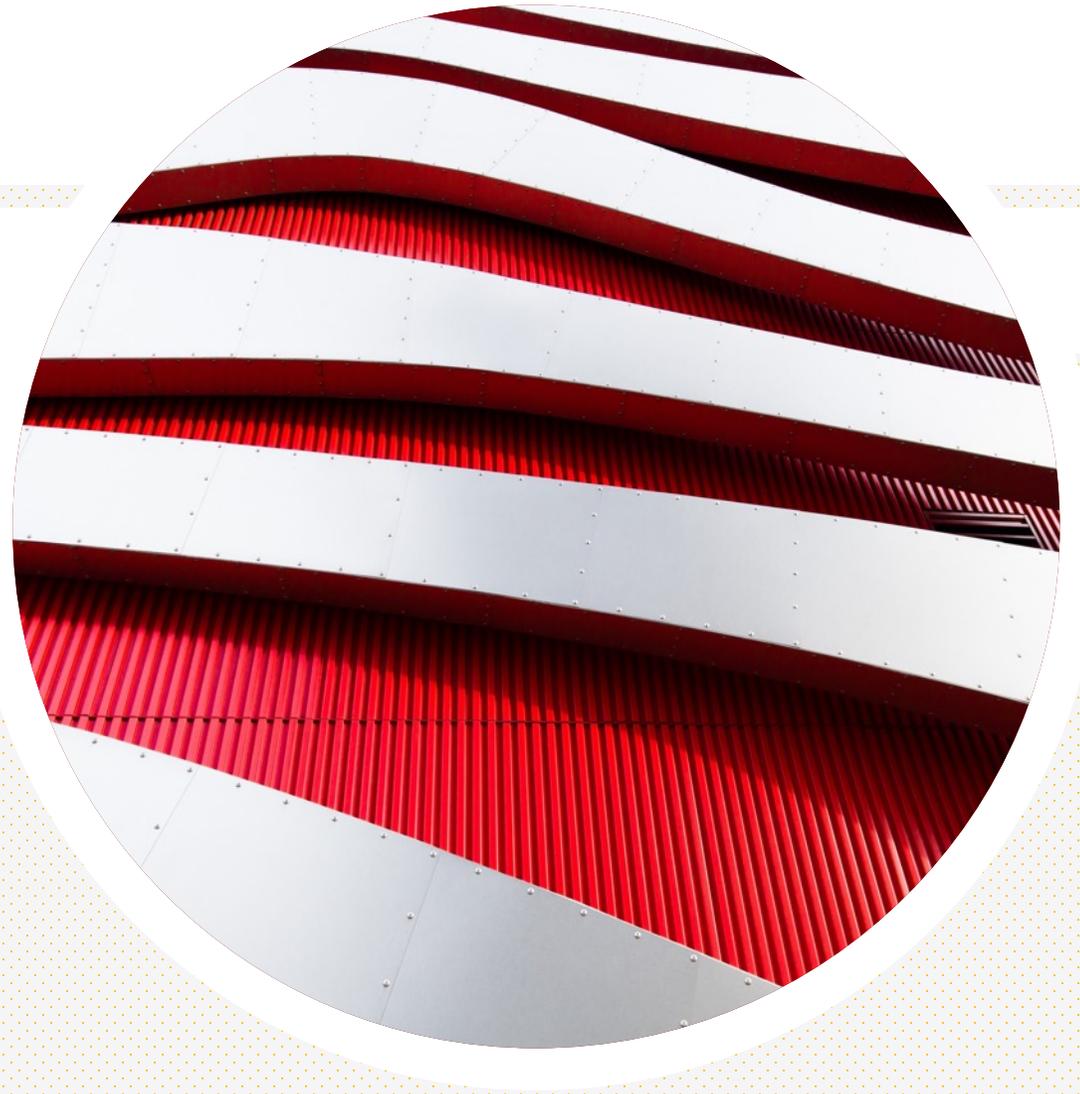
WC overview

- ➔ Employee's workplace related injury or illness
- ➔ Reported to employer in timely manner
- ➔ Medical expenses, travel , wage replacement while out
- ➔ Return to work as soon as possible on light duty, until MMI
- ➔ FMLA and ADA can kick in
- ➔ No retaliation



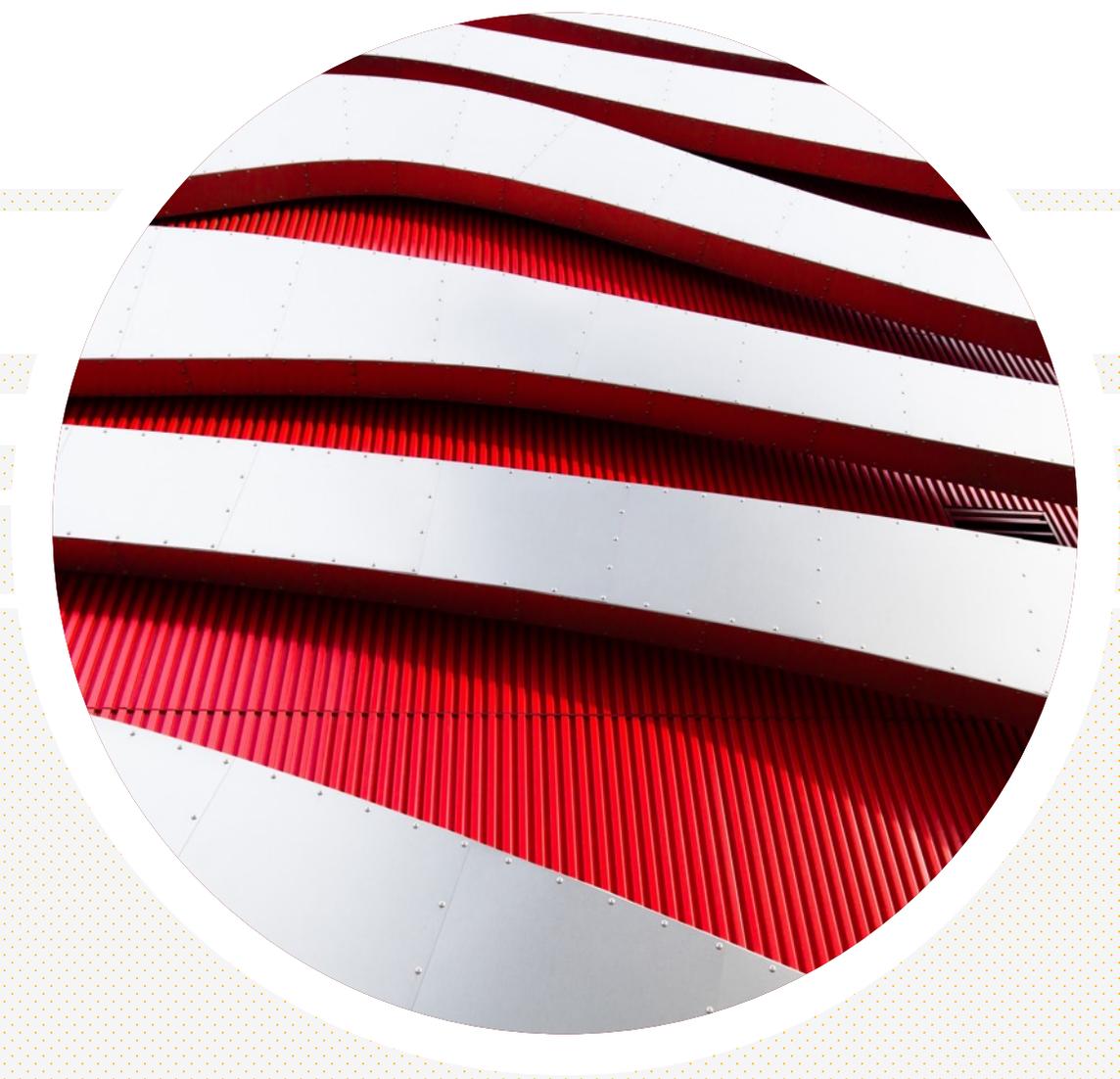
FMLA overview

- ➔ 12 weeks of leave during a 12-month period to eligible employees (or up to 26 weeks of military caregiver leave to care for a covered servicemember with a serious injury or illness)
- ➔ paid, unpaid or a combination of paid and unpaid leave, depending on the circumstances of the leave
- ➔ after working for ER for 12 months/52 weeks (need not be consecutive) and 1250 hours (not counting leave)
- ➔ No retaliation



ADA overview

- ➔ Prohibits discrimination against: persons with current disabilities, persons with a “record” of a disability, or persons you “regard” as disabled (even if they aren’t)
- ➔ EE who is any of these must be **qualified** to do the job: perform the essential job functions (EJF) with or without reasonable accommodation (RA)
- If an ER suspects a disability, or if request for RA is made, then ER is obligated to engage in the Interactive Process (IP) to “permit an equal opportunity to apply for a job, to perform a job or to gain access to the workplace, or to enjoy access to the benefits and privileges of employment.”



Why do you need to know about it?

- Damages from mishandling claims related to employee absences or requests for leave
- Backpay, retroactive benefit payments, compensatory damages, punitive damages, attorney's fees
- Bad PR for your employer (and you)

And last but not least

- Ethical and moral obligation to ensure that you comply with the law

If you know the purpose of each law, you can understand better how they interact.



Purposes

WC

Compensate employees for lost wages while out of work; get them back to work as soon as possible doing some kind of work (usually called “light duty”) with eventual return, if possible, to full time duty-all time out is paid

FMLA

Protects an employee from termination for using leave (absenteeism/tardiness) while they are using leave (either intermittently or for periods of time); time out can be paid or unpaid.

ADA

Keep employees employed and able to perform the essential job functions of the position for which they were hired; requires employers to engage in continuing discussions with employees about how to do this; for large employers, duty imposed to find other jobs for employees who can't do their jobs anymore or restructure jobs to make it possible for employee to do it; key is reasonableness



Who enforces and against whom?

WC

- Industrial Commission
- Against all employers, no matter size

FMLA

- US Dept of Labor
- Against 50 or more employees for at least 20 weeks during current or preceding calendar year

ADA

- EEOC
- Against 15 or more employees for 20 weeks during current or preceding calendar year



Who gets it?

WC

An employee who has an injury arising out of or in the course of employment

FMLA

An employee who has worked at least 12 months and 1,250 hours before the start of the leave and who works at or reports to a worksite at which 50 or more employees work within a 75-mile radius.

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



Relationship to Light Duty

WC

- Light duty is often offered because WC best practice is to get employee back to work as soon as possible to reduce the wage replacement (66 2/3 for no work) burden

FMLA

- Leave is leave; ER can not require EE to come in for light duty while on leave

ADA

- ERs must be careful when dealing with WC employee who also has disability to make it clear that light duty is not a permanently reasonable accommodation, **IF IN FACT IT IS NOT**; once you offer it, it is presumptively reasonable and you'll need to be able to explain why and how it becomes unreasonable

Relationship to Leave

WC

- No limit on leave

FMLA

- 12 weeks in 12 twelve months (or 26 weeks to care for injured service member)

ADA

- Limited only by whether ER is able to argue it's unreasonable/undue hardship



What kind of documentation can you get initially and when returning to work?

WC

- Must pertain to the on the job injury and is usually required

FMLA

- What's on the DOL form (wh-380-e) initially with re-cert available if necessary and when returning to work only if ER requires for other EEs returning to work

ADA

- Only examinations or inquiries that are job-related and limited to determining ability to perform the job and whether an accommodation is necessary and would allow performance of EJP



Reinstatement rights?

WC

None, unless denied out of retaliation (violation of REDA)

FMLA

- Required to same or equivalent job; no undue hardship/unreasonableness exception

ADA

Required unless undue hardship or unreasonable



Case Study

▶ *Let's see if we can spot some issues
and
opportunities for process improvement.*

What to Do?

Issues?



Process Improvement?



HR works with the EE to access FMLA and offers up ADA if FMLA leave is not enough or runs out

- That's actually excellent because the ADA can kick in when FMLA is not enough. But what responsibility does WC have for any of the residual impairment from the first accident which was made worse by the concussion resulting from the home injury and the concussion resulting from the second auto accident?
- ADA request for reasonable accommodation made and accepted and EE is given a screen and monitor and frequent break times to deal with her vision and headache issues. Clearly, ER is on notice of disability or is regarding her as having a disability.



Heading towards the storm clouds. . .

- Supervisor continues to criticize job performance and gives EE a PIP
- PIP cites following issues:

The purpose of this Performance Improvement Plan (PIP) is to identify performance issues that need to be corrected and create a written plan of action to promote successful performance. ***As I certainly support your use of Family Medical Leave (FML) and any other resources offered to employees, all concerns listed are unrelated to your use of intermittent FML.*** My comments below represent a pattern of performance concerns and/or incidents that are impacting our ability to meet our business needs and require your immediate attention. I have also included the full list of resources available to employees.

Areas of Concern

- 1. Planning, Judgement, and Decision-Making
- 2. Quality of Work
- 3. Initiative and Flexibility
- 4. Communication
- 5. Teamwork and Cooperation



Heading towards more storm clouds. . .

. And this:

Observations, Previous Discussion, or Counseling

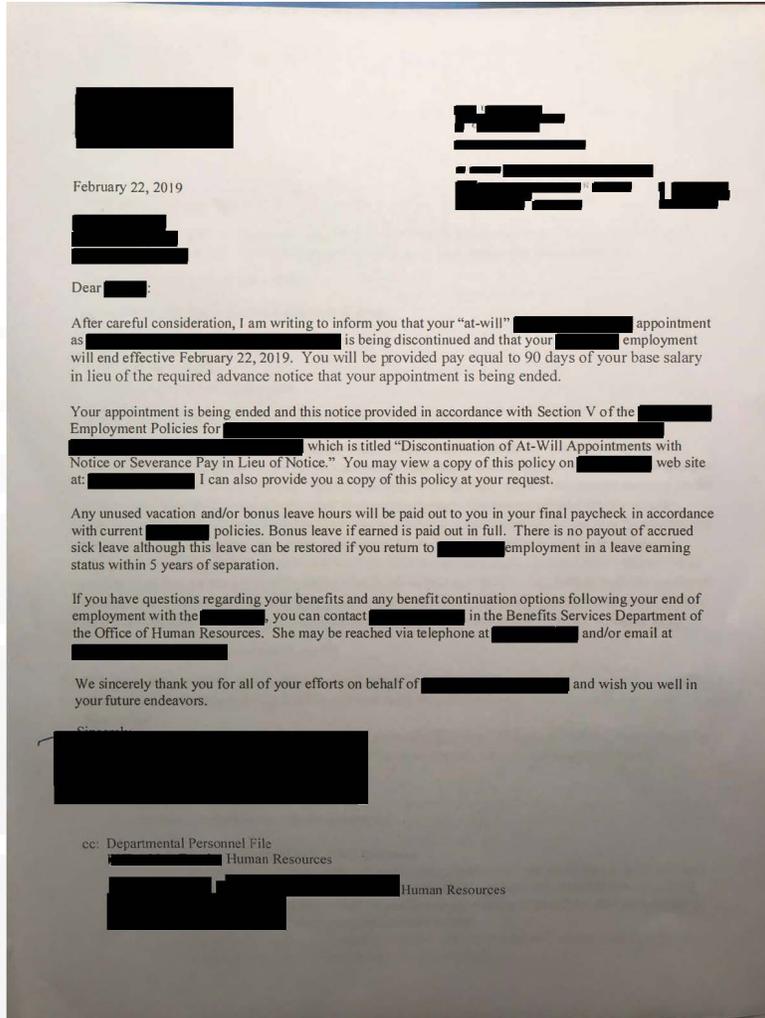
Your continued lack of effective strategic planning across work teams, combined with a failure to engage the appropriate staff resources with the appropriate need/request - has severely undermined your effectiveness to carry out your duties successfully.

On July 31, 2018, you were presented with a FYI 8 Annual Performance Review for the period of July 1, 2017 thru June 30, 2018 with an overall rating of "Not Meeting Expectations." This rating was based on concerns that were discussed with you during your FYI 7 Performance Review in July 2017, subsequent meetings and observations throughout fall 2017, again during your January 2018 mid-year review, and in subsequent discussions and observations during late spring, summer and fall of 2018.

- Though this PIP begins with the most recent events, I am also including some historical review so that it will assist you in understanding the pattern that has evolved of performance deficiencies that need addressing by you.
- Specific examples of previous and continuing management concerns include



The end of the road . . .



Which umbrella to use?

- Employee is out of work: is she entitled to 66 2/3 of her lost wages **due to original WC** injury?
- Should the supervisor and HR have engaged in the **ADA interactive process** prior to termination to determine if there are other positions with the ER that this employee could do, on a part-time or full-time basis?
- Employee's **FMLA period was over in mid February**; she was terminated in late February. No reasons was given for her termination.





Food for thought:

- Worker's comp EEs can bring REDA if they can allege they were retaliated against for their worker's comp claim
- FMLA and ADA both have retaliation claims
- ADA requires interactive process; if ER has other jobs the employee can do AND her disability is preventing her from performing the EJM in her current jobs, then ER may be obligated to do a job search and offer other jobs before terminating the employer.
- The mention of the FMLA leave in the PIP was probably not a good idea, especially if performance is going to be "bona fide non-discriminatory reason."
- The lack of any reason for the termination was also not a good idea; the "bona fide non-discriminatory reason" will be post hoc.

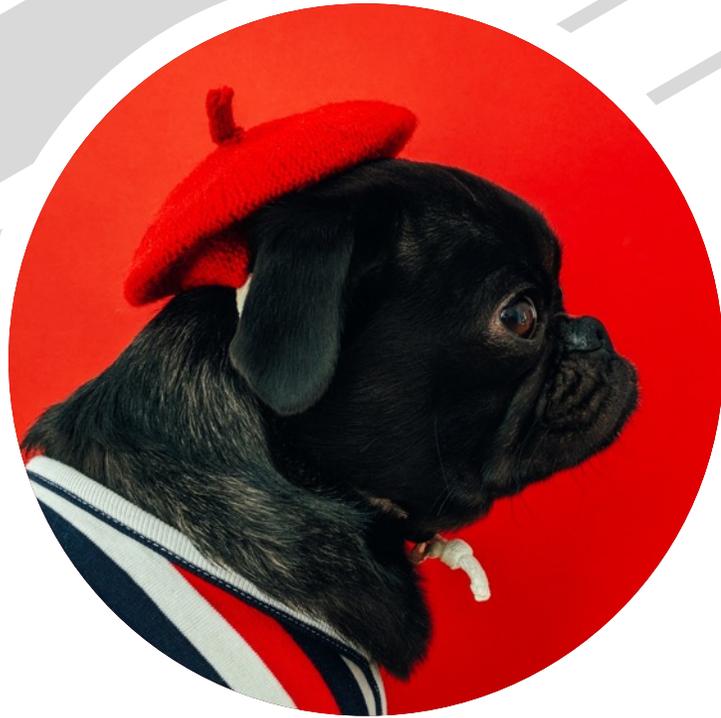




Remember: each law is different.

- Different purposes
- Different enforcers (DOL, EEOC, State Industrial Commission)
- Applies to different employees/employers
- Different relationships to light duty
- Different relationships to leave
- Different documentation requirements
- Different reinstatement rights





“ Remember--the purposes are different:

- The ADA prohibits discrimination.
- The FMLA sets minimum leave standards and guarantees a job.
- Workers' compensation laws provide for payment of compensation and rehabilitation for workplace injuries and minimize employer liability.





“ If you can't be an example, at least be a cautionary tale.





THANK YOU



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