Drugs in the Workplace:

Legalization of Medical Marijuana & Post-Accident Drug Testing

Patricia F. Weisberg
Walter|Haverfield, LLP

Walter|Haverfield LLP

September 6, 2016

Background

- On June 8th, Ohio became the 25th state to enact medical marijuana legislation.
- DOJ no longer attempts to prosecute medical marijuana distributors.
- DOJ also will not challenge state laws.
- But who knows what will happen after the election?

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Ohio Legalized Medical Marijuana

- Governor Kasich signed HB 523 on June 8.
  - Effective **September 6, 2016**
- Licensed physician may "recommend" medical marijuana to an individual diagnosed with one or more of 20 qualifying conditions or diseases.

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Qualifying Diagnoses

- (a) Acquired immune deficiency syndrome;
- (b) Alzheimer's disease;
- (c) Amyotrophic lateral sclerosis;
- (d) Cancer;
- (e) Chronic traumatic encephalopathy;
- (f) Crohn's disease;
- (g) Epilepsy or another seizure disorder;
- (h) Fibromyalgia;
- (i) Glaucoma;
- (j) Hepatitis C;
- (k) Inflammatory bowel disease;
- (l) Multiple sclerosis;
- (m) Pain that is either of the following:
  - (i) Chronic and severe;
  - (ii) Intractable.
- (n) Parkinson's disease;
- (o) Positive status for HIV;
- (p) Post-traumatic stress disorder;
- (q) Sickle cell anemia;
- (r) Spinal cord disease or injury;
- (s) Tourette's syndrome;
- (t) Traumatic brain injury;
- (u) Ulcerative colitis;
- (v) Any other disease or condition added by the state medical board under section 4731.302 of the Revised Code.

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General Provisions

- Bill went into effect on September 8, 2016.
- Marijuana smoking is not permitted.
- Permitted uses:
  - Vaporization, tinctures (medicine made by dissolving a drug in alcohol), edibles, patches, plant materials, and oils

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Medical Marijuana Control Program

- Must be fully operational by September 2018.
- State licensure of medical marijuana cultivators, processors, retail dispensaries, and testing laboratories and the registration of physicians that recommend treatment with medical marijuana.
- Bill 523 establishes the Medical Marijuana Advisory Committee to enact regulations for medical marijuana. The Committee will be a part of the State Board of Pharmacy and the Department of Commerce.
- Municipalities are not entitled to a member on the Committee.

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Medical Marijuana Cards

- Individuals may apply for a medical marijuana card.
- Ohio will not accept applications for several months.
- May have defense to criminal prosecution before applications accepted with physician's certification.

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Impact on Employers

Safeguards in the law protect employers.

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Accommodation and Adverse Employment Action

- Employers are not required to permit or accommodate an employee's use, possession, or distribution of medical marijuana.
  - Law regarding ADA accommodations is likely to evolve as use becomes more prevalent.
- Employer may refuse to hire, discharge, discipline, or take an other adverse employment action due to an employee's marijuana use, or possession or distribution or medical marijuana.

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- Employees and applicants may not sue employers for adverse action based on medical marijuana use;
- Employers may establish and enforce drug free workplace policies;
- DOT and workers' compensation may be enforced;

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Drug-Free Workplace Programs

- Employers may establish or maintain a formal drug-free workplace program.
- "Just cause" if discharged for violating drug-free workplace policy by using medical marijuana.
  - Ineligible for unemployment compensation.

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Worker's Compensation

- The Administrator of Workers' Compensation may still grant rebates and discounts to employers with a drug-free workplace program.
- BWC will not be required to pay for patient access to marijuana.
- An employer may defend against workers' compensation claims when medical marijuana contributes to or results in injury.

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Workers' Compensation (con't.)

- Rebuttable presumption: positive drug test defeats claim only if drug not prescribed by healthcare provider.
- Argument-medical marijuana prescribed
- Causation-drug use proximate causation; usually evidenced by high level of drug in the employee's system; difficult with marijuana

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Next Steps for Employers

- Review and update drug-free workplace programs.
  - Define illegal drugs to include drugs illegal under federal, state, or local law.
- Employers may treat the use of medical marijuana similar to use of legally prescribed drugs.
- Careful-disability
  - Is it "illegal" drug use?
  - Do you have to engage in the interactive process?
  - Do you have to reasonably accommodate?
    - How might you reasonably accommodate?

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Next Steps for Employers

- PLAN-have a policy in writing
- Notify employees how you will handle medical marijuana
- Stay abreast of changes in the federal law, workers' compensation decisions, other administrative decisions and case law

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Federal Re-Classification

- This summer, the DEA decided not to re-classify marijuana as a Schedule II drug.
- However, this still may happen in the future.
- This would make Marijuana available as a prescription.
  - Not subject to sales tax.
- Potentially, federal regulation could trump state and local regulation.
  - FDA approval would be necessary, which could take years and cost billions.

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OSHA Rule

Employer cannot use drug testing, or threat of drug testing, to retaliate against reporting, or to deter reporting.

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New OSHA Regulations

- Included in OSHA's new final rule regarding electronic reporting requirements.
  - Issued May 12, 2016
- Effective on **November 1, 2016**
  - Originally rules were set to become effective on August 1, 2016, but OSHA pushed back the date to allow additional time to publish guidance after industry groups filed lawsuits.

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New Requirements for Employers

1) Provide certain information on injury and illness reporting to employees.
   - "It's the Law" poster from April 2015 or later

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New Requirements for Employers

2) Reporting procedures must be ***reasonable*** ***and not deter or discourage employees from reporting.***

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New Requirements for Employers

3) Employers are expressly prohibited from ***retaliating against employees for reporting*** work-related injuries and illnesses.

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- Employers are required to ensure that employees understand they will not be retaliated against for reporting workplace injuries and illnesses.

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MISC.

- Minimum-$5,000 for failing to report (old penalty was $1,000)
- Special circumstances Area Directors will be permitted to increase the penalty to $7,000 "necessary deterrent effect"
- OSHA will not use the Rapid Response Investigation to cite a condition discovered by the employer during its internal investigation
- Problem-Safe Harbor doesn't apply to "serious violations"

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Enforcement

- OSHA says it can issue citations for:
- alleged retaliatory or discriminatory conduct in the absence of an employee complaint and
- Implementing policies and procedures that could reasonably discourage an employee from reporting a workplace injury or illness even when there was no retaliation or discrimination; no failure to report; and no injury
- (Sound like the NLRB?)

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Blanket Post-Accident Drug Testing

- Blanket, automatic post-injury drug testing is considered a form of adverse action that can discourage reporting.
  - Blanket policy **presumed retaliatory.**
- Should not use post-injury drug tests if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment.
  - Bee sting, injury caused by long-term strain, injury caused by a malfunctioning tool, etc.
  - Urine test for illegal drug use unlikely to determine "impairment"
  - **NO IMPACT on random testing**

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- What is reasonable policy?
  - Report immediately, within 8 hours, or before the end of the shift?
  - Incentives or rewards for keeping workplace injuries down could be construed as encouraging employees not to report illness and injuries or could be viewed as retaliation (pressure from co-workers or supervisors)

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Employers May Conduct Post-Injury Drug Test for the Following Reasons:

1) To comply with the requirements of a state or federal law or regulation, or to comply with an insurance policy.
   - Drug-Free Workplace Program
   - Department of Transportation regulations
   - Worker's Compensation

2) Reasonable suspicion of impairment.

3) Reasonable possibility that drug use was a contributing factor to the injury.

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OSHA May Take Action With or Without Employee Complaint

- Employee may report retaliation in violation of OSH Act within 30 days of the violation.
- New law allows OSHA to cite an employer within six months of the violation, without a complaint filed by an employee.

- Penalties for each violation range from $12,471 for each violation, to $124,709 for repeat or willful violations
  - Also include make-whole relief such as back-pay and reinstatement.

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Next Steps for Employers

- Revise blanket post-injury drug testing policies.
  - Limit post-accident testing to instances when drug impairment is suspected, and/or could have reasonably contributed to the injury, and where the test could indicate impairment, rather than general drug use.
- Train staff and supervisors on the new policy.

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The Real World

- Connecticut Supreme Court-reinstatement of University of Connecticut employee who was caught smoking marijuana during working hours.
- Termination was not the only appropriate disciplinary action.
- Arbitrator found that termination was too harsh a penalty.
- High level of deference to arbitration awards.

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New Mexico-No reasonable accommodation required

- Employers are not affirmatively required to provide reasonable accommodations for use of the prescribed marijuana, according to *Garcia v. Tractor Supply (2016).* The court in *Garcia* held that an employer permissibly fired an employee legally using marijuana for medical conditions because federal law prohibited the use of the controlled substance

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- The employee, Garcia, was diagnosed with HIV/AIDS and prescribed medical marijuana pursuant to New Mexico's Compassionate Use Act
- Hired by Tractor Supply, after informing it of his diagnosis and use of medical marijuana. Upon hiring, the employee failed a required drug test, testing positive for cannabis metabolites. Tractor Supply terminated the employee based on the positive test.
- The former employee sued in the District Court for the District of New Mexico, claiming that his discharge violated the state law prohibiting disability discrimination, because his medical marijuana use was treatment for his medical condition and the employer should have reasonably accommodated his use.
- The employer argued that it was not required to provide any accommodations for use of a substance that remains illegal under federal law.
- The New Mexico court agreed with the employer and found that an employer is not required to accommodate an employee's illegal drug use because it would be permitting conduct that the Controlled Substances Act expressly prohibits.

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Blogs

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Overtime Overhaul – Preparing for Final Rule Implementation

Presented by:
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for:
CLEVELAND SHRM LEGISLATIVE

September 6, 2016

Littler

Agenda

A Quick Review

DOL's Final Rule

Preparing for Change

Fair Labor Standards Act

- The FLSA requires payment of the minimum wage for all hours worked and overtime at 1 ½ times an employee's regular rate for all hours worked over 40 in a week
- Since it was passed in 1938, Section 13(a)(1) of the FLSA has included **exemptions** from both the minimum wage and overtime requirements for:
  - Executives;
  - Administrative employees;
  - Professionals;
  - Outside sales employees.
- "[A]s such terms are defined and delimited from time to time by regulations of the Secretary."

29 C.F.R. Part 541

DOL has defined these exemptions (the "white collar") by federal regulations at 29 C.F.R. Part 541

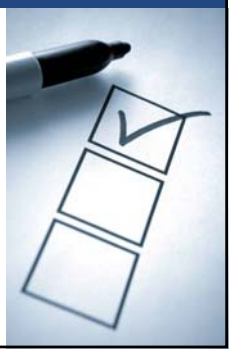
- Executive
- Administrative
- Learned Professional
- Creative Professional
- Computer
- Outside Sales

29 U.S.C. § 213(a)(1)

- The "white collar" exemption is a complete minimum wage and overtime exemption for *bona fide* executive, administrative, professional and outside sales employees "as such terms are defined and delimited from time to time by regulations of the Secretary subject to the provisions of [the Administrative Procedure Act]"

Three Tests for Exemption

- Salary Level
- Salary Basis
  - Salary level and basis tests do not apply to lawyers, doctors, teachers or outside sales
  - Computer employees can be paid by the hour ($27.63)
- Duties



The Rulemaking Process

- March 2014, Memorandum: President Obama directs Secretary of Labor Perez to revise the overtime regulations
- Summer 2014, Secretary Perez held "listening sessions" with stakeholders

- July 6, 2015, Wage & Hour Administrator Weil issues the NPRM, proposing changes to the Part 541 regulations.
- September 4, 2015, the comment period closed after nearly 300,000 comments were filed, a DOL record

- March 14, 2016, DOL sends Final Rule to White House Office of Management & Budget for review
- May 18, 2016, DOL publishes the Final Rule

Public Comments

- Some employers acknowledged that an increase in salary level is due, but most said $50,000 is too high
  - Some employers suggested a 3 to 5 year phase-in period
- Employers supported counting bonuses towards salary level, but also stated:
  - Commissions should also count
  - Bonuses paid quarterly or annually should also count
  - Should not be limited to just 10%
- Near universal opposition to annual increases
  - Some commenters suggested an alternative of automatic increases every 5 years
- Employers objected to any changes in the duties tests because of DOL's failure to provide sufficient notice

What is NOT Changing

- No changes to the salary *basis* test
- No changes that impact outside sales, teachers, lawyers or doctors
- No changes to the duties tests
  - No changes in the definition of primary duty
  - No changes to the concurrent duties provision

Minimum Salary Level

$913 per week ($47,476 annualized)

- Up from the current $455 per week ($23,660 annualized)
- Down from DOL's proposed $50,440
- Set at the 40th percentile of full-time non-hourly paid employees is the lowest wage Census region (South)

Bonuses and Commissions

Nondiscretionary bonuses, incentive payments and commissions, paid at least quarterly, can satisfy up to 10 percent of the minimum salary requirement

How Will This Work?

- Each workweek, the employer must pay the exempt employee a salary of at least 90% of the minimum salary level – $821.70 ($42,728.40 annualized)
- At the end of the quarter, if that salary plus all bonuses/commissions paid during the quarter do not equal $47,476, to maintain the exemption, the employer has to make up the shortfall in the first pay period of the next quarter.

Highly Compensated Employees

$134,004 total annual compensation
- Up from the current $100,000
- Up from DOL's proposed $122,000
- Set at the 90th percentile of full-time non-hourly paid employees nationwide

Automatic, Annual Increases

The salary levels will automatically increase every 3 years, beginning January 1, 2020

How Will This Work?

- DOL will provide notice of the new salary levels "not less than 150 days before the January 1st effective date" in the Federal Register and at www.dol.gov/whd
- New levels will be based on BLS Current Population Survey data from the second quarter of the year preceding the update
  - The minimum salary level will be "updated to equal" the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region
  - The HCE level will be "updated to correspond to" the 90th percentile of weekly earnings data of full-time nonhourly workers nationally

Effective Date

- December 1, 2016
- WARNING: Providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds also must comply by 12/1
  - DOL's policy delaying enforcement until March 2019 ***does not*** prevent employees from bringing private litigation

Path to Stop or Modify the Rule?

- Protecting Workplace Advancement and Opportunity Act
  - Introduced March 17, 2016 by Senate and House Republicans; even if passed, unlikely to withstand President Obama's veto
  - Nullify proposed or final rule
  - Prohibit automatic salary increases and changes to duties test without further notice and comment
- Congressional Review Act
  - Requires joint resolution of Congress within 60 legislative days of publication of the Final Rule
  - CRA will not be available for regulations published by May 16
  - President Obama would veto

Path to Stop or Modify the Rule?

- Litigation Challenge
  - There are arguments that DOL does not have authority for the automatic salary increases and the very high salary level
- New Notice of Proposed Rule Making
  - An incoming Republican administration could restart the regulatory process
  - Most likely also would be limited to automatic salary increases and changes to the duties test
  - Difficult to walk back from the salary level increase

Preparing for Change

- Bottom line: The new rules are ***not*** going to go away
- Determining who to reclassify and implementing reclassification can take up to ***six months***
- December 1st will be here before you know it
  - State laws notice of pay changes 7 to 14 days in advance (30 days in Missouri for reductions in pay)
- Don't wait! Start ***NOW!***

Compliance, Step-By-Step

1. Identify employees who need to be reclassified
2. Develop new compensation plan for the reclassified employees
3. Review wage-hour policies and processes
4. Communicate the changes
5. Train the reclassified employees and their managers

Identify Jobs for Review

- Jobs paid below $47,476 annual salary
  - Or, below $42,728.40 annual salary with at least $4,747.60 in bonuses and commissions
- Also, consider a job duty review
  - Even if salary level is not an issue, you may have employees who do not meet the duties requirements for exemption under the current regulations
  - Rare opportunity to correct classification issues with reduced risk of triggering litigation

Salary Increase or Overtime?

- Pull salary and incentive pay data
- Calculate the cost of increasing salary to $47,476
  - Consider lowering incentive pay to offset salary increase
- Calculate the cost of overtime
  - How many hours are exempt employees are working?
  - (Weekly salary / 40) * 1.5 * expected overtime hours

Cost-Neutral Solution

Weekly Salary / (40 + (OT Hours x 1.5))

- With a good estimate of expected weekly work hours, applying this formula will provide an hourly rate which will result in the same weekly and annual compensation
- Yes, its legal – DOL gave us this formula in the preamble to the 2003 Notice of Proposed Rulemaking (68 F.R. 15576)

Job Review Process

- Conduct under the attorney-client privilege
- Review HRIS Data – salaries, bonuses, direct reports, educational degrees
- Review Documents – job descriptions, training materials, performance expectations
- Interview SME managers
- Legal analysis to determine if job duties qualify for an exemption

Review Policies and Processes

- Policies
  - Off-the-clock work
  - Meal and rest break
  - Travel time
  - Mobile device
- Processes
  - Timekeeping
  - Payroll changes
  - Controlling overtime hours

Communicate the Changes

- Need to communicate with senior management, managers of reclassified employees and the employees themselves
- Key decisions
  - Who will communicate the changes?
  - What will be communicated?
  - How will changes be communicated?
  - When will the changes be communicated
- Prepare talking points and FAQs

Training

- Train the reclassified employees and their managers
  - Wage & hour policies
  - Timekeeping procedures
  - Activities that are compensable work

Questions?

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Review of EEOC Initiatives

Cleveland SHRM
September 6, 2016

Position Statements

- EEOC will now release employer's position statement and supporting documents to a Charging Party
- Provide Charging Party with a chance to rebut the allegations
- EEOC will not provide Charging Party's rebuttal to the employer

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Position Statements - Confidentiality

- Redact where necessary
- Refer to but do not identify sensitive information
- Provide separate attachments labeled "Sensitive" or "Confidential" and "Do not Disclose to Charging Party"
- Always provide explanation justifying confidentiality

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Position Statements – Confidentiality

Examples of sensitive/confidential information:

- Sensitive medical information (except for the Charging Party's medical info).
- Social Security Numbers.
- Confidential commercial or financial information.
- Trade secret information

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Position Statements – Confidentiality

- Non-relevant personally identifiable information of witnesses, comparators or third parties, for example, social security numbers, dates of birth in non-age cases, home addresses and personal phone numbers, etc.

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Position Statements – Confidentiality

- Any reference to other charges filed against the Respondent or to other charging parties, unless the other charges are by the Charging Party.

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Position Statements – Confidentiality

- EEOC will review confidential attachments and consider the justification provided
- EEOC *may* redact confidential information as necessary before releasing the information to the Charging Party.

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Position Statements in General

- Share only essential facts
- EEOC claims it will protect confidential information, but there is no guarantee
- Think about what you do and do not want the Charging Party to know
- Be clear, concise, complete and responsive

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Employer-Provided Leave and the ADA

- May 2016 resource document
- Provides guidance on when and whether an employer must provide extended or intermittent leave as a reasonable accommodation under the ADA

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Employer-Provided Leave and the ADA

- If an employer receives a request for leave for reasons related to a disability and the leave falls within the employer's existing paid leave policy, the employee should be treated the same as one requesting leave for a reason unrelated to the disability

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Employer-Provided Leave and the ADA

- Unpaid leave must be considered as a reasonable accommodation, if it does not create undue hardship, even when:
  - Employer does not offer leave as a benefit
  - Employee is not eligible for leave
  - Employee exhausted the leave the employer provides as a benefit (e.g., FMLA leave)

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Employer-Provided Leave and the ADA

- All requests for leave for a medical condition are considered requests for a reasonable accommodation
  - Can be satisfied under other policies (FMLA, Workers' Compensation, etc.)
  - Employer is also permitted to consider if an accommodation other than leave is feasible

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Employer-Provided Leave and the ADA

- May have to grant leave or absences beyond its normal leave policies as a reasonable accommodation.
- Do not automatically terminate employee if leave extends beyond policy

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Employer-Provided Leave and the ADA

- Examine the need to extend leave on a case-by-case basis
- Consider additional days off for unplanned absences
- Use caution in issuing form letters re: failure to return to work may result in termination or discipline

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Employer-Provided Leave and the ADA

- 100% healed policies are a violation of the ADA
- If medical restrictions pose a safety risk, employer must establish the individual is a direct threat and must still consider reasonable accommodations to diminish or eliminate the threat

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Employer-Provided Leave and the ADA

- Reassignment to a vacant position is required if the disability prevents the employee from performing one or more essential functions of the job

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Employer-Provided Leave and the ADA

- Undue hardship determination involves:
  - Length and frequency of leave
  - Flexibility in days off
  - Predictability
  - Whether others can chip in and perform job duties
  - Impact on operations

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Employer-Provided Leave and the ADA

- Indefinite leave – meaning an employee cannot say whether or when she will be able to return to work at all – will constitute an undue hardship

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Employer-Provided Leave and the ADA

- Leave as a reasonable accommodation includes the right to return to original position
  - If holding the job will cause an undue hardship, alternatives must be considered

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Final Rules for Wellness Under ADA and GINA

- Effective January 2017
- Rules are not entirely aligned with the Affordable Care Act regulations
- Differences between EEOC and ACA's regulations make task of designing a compliant wellness program more complex.

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Final Rules for Wellness Under ADA and GINA

- Under the ACA, wellness programs may offer incentives of up to **30 percent of the cost of an individual's annual health premiums whether family or employee-only**, and for tobacco-cessation programs, up to 50 percent of the cost of health premiums

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Final Rules for Wellness Under ADA and GINA

- Per the EEOC, if Employer requires enrollment in a particular health plan to participate in a wellness program asking questions about health or including medical exams, the incentive to the employee may not exceed **30 percent of the total cost of the self-only version of the plan**

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Final Rules for Wellness Under ADA and GINA

- Per the EEOC, if more than one self-only health plan is offered and enrollment is not required to participate in the wellness program, the incentive may not exceed **30 percent of the lowest cost major medical self-only plan the employer offers**

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Final Rules for Wellness Under ADA and GINA

- If no health plan, but a wellness program is offered, the incentive may not exceed **30 percent of the total cost to a 40-year-old nonsmoker purchasing self-only coverage under the second-lowest cost Silver Plan available on the state or federal exchange**

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Final Rules for Wellness Under ADA and GINA

- If employees are merely asked if they smoke
  - The 30 percent limit does not apply because it is not a wellness program asking a disability-related question
  - Employers can offer incentives of up to 50 percent of the cost of self-coverage only

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Final Rules for Wellness Under ADA and GINA

- Employers offering incentives previously permitted under the ACA are urged to reexamine their wellness programs in light of these Final Rules

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Enforcement Guidance on Retaliation

- Issued August 25, 2016
- Response to increasing retaliation complaints
- Outlines standards EEOC will use to establish retaliation
- Covers retaliation claims under Title VII, ADEA, ADA, EPA, GINA and Section 501 of the Rehabilitation Act

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Enforcement Guidance on Retaliation

- Opposition to harassment or discrimination is protected
  - If it is reasonable; and
  - Opposition must be based upon a good faith belief the employer's conduct is or could become unlawful

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Enforcement Guidance on Retaliation

- Adverse action against an employee opposing retaliation is prohibited
  - Covers actions that might well deter a reasonable person from complaining about retaliation
  - Encompasses broader range of actions than those prohibited by non-discrimination provisions of the laws

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Enforcement Guidance on Retaliation

- EEOC takes an expansive approach and provides a long list of examples
- Demotions, suspensions and terminations
- Threats, warnings, low evaluations and transfers
- Can take place outside of work

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Enforcement Guidance on Retaliation

- Causal connection required to establish retaliation
- EEOC provides a list of facts that may support and rebut retaliation

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Enforcement Guidance on Retaliation

- Facts supporting a finding of retaliation
  - Suspicious timing
  - Oral or written statements
  - Comparative evidence
  - Inconsistent or shifting explanations

Enforcement Guidance on Retaliation

- Facts that may defeat a claim of retaliation
  - Employer unaware of protected activity
  - Legitimate non-retaliatory reason for adverse action
    - Poor performance
    - Inadequate qualifications for position sought
    - Negative job reference
    - Misconduct
    - Reduction in force

Enforcement Guidance on Retaliation

- ADA prohibits not just retaliation, but interference with the exercise or enjoyment of ADA rights
- Interference is broadly interpreted and covers conduct not meeting the materially adverse standard for retaliation

Enforcement Guidance on Retaliation

- Examples of prohibited conduct:
  - Coercing to relinquish or forgo accommodation
  - Intimidating applicant
  - Threatening loss of employment if employee does not voluntarily submit to medical exam
  - Fixed leave policy
  - Telling employee you will provide negative job reference if sued

Enforcement Guidance on Retaliation

- Best practices for employers
  - Write or update anti-retaliation policy that complies with the law
  - Train employees, managers, executives and supervisors
  - Create complaint mechanism
  - Proactively follow up with employees after protected activity

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Thank You!

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The Intersection of the ADA and FMLA: Leave Law and Workplace Accommodations

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Ogletree Deakins

Rules of the Game
Family and Medical Leave Act

Provides for up to 12 weeks of leave in a 12-month period (26 weeks for military caregiver):

- for an employee's own serious health condition;
- for the serious health condition of an employee's immediate family member (spouse, son, daughter, or parent);
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on active military duty or notified of an impending call or order to active duty in support of a contingency operation; or
- to care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the service member.

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Rules of the Game
FMLA: Eligibility

Employee must:

- have worked for the employer for at least 12 months;
- have worked at least 1,250 hours during the 12 months preceding the leave; and
- be employed at a location where there are at least 50 employees within a 75 mile radius.

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Rules of the Game
FMLA: Serious Health Condition

Serious health condition is defined as an illness, injury, impairment or physical or mental condition that involves:

- inpatient care, or
- continuing treatment by a healthcare provider.

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Rules of the Game
FMLA: Inpatient Care

Inpatient care is defined as an overnight stay in a hospital, hospice, or residential medical care facility.

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Rules of the Game
FMLA: Continuing Treatment

Continuing treatment by a healthcare provider includes:

1. a period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: (a) treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, nurse under direct supervision of a health care provider, or provider of health care services under orders of, or on referral by, a health care provider, or (b) treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider;

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Rules of the Game
FMLA: Continuing Treatment

2. a period of incapacity due to pregnancy, or for prenatal care;

3. a period of incapacity or treatment for such incapacity due to a chronic serious health condition (i.e., requires periodic visits (at least twice a year), continues over an extended period of time (including recurring episodes of a single underlying condition), or causes episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.));

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Rules of the Game
FMLA: Continuing Treatment

4. a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, or the terminal stages of a disease); and

5. absences to receive multiple treatments for restorative surgery after an accident or other injury, or a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment (e.g., chemotherapy/radiation for cancer, physical therapy for severe arthritis, dialysis for kidney disease, etc.).

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Rules of the Game
FMLA: Incapacity

Incapacity means the inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

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Rules of the Game
FMLA: Medical Documentation

Employer can require a fitness for duty certification so long as advance notice is provided to the employee that the fitness for duty certification will be required in order to return to work.

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Rules of the Game
FMLA: Reinstatement

Employer must restore the employee to the original position or an equivalent position.

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Rules of the Game
Americans with Disabilities Act

Prohibits discrimination against a qualified individual with a disability.

Disability is defined as:

(1) an impairment that substantially limits a major life activity,

(2) having a record of such an impairment, or

(3) being regarded as having such an impairment.

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Rules of the Game
ADA: Major Life Activity

The ADA Amendments Act expanded the definition of major life activity to include:

- learning,
- reading,
- concentrating,
- thinking,
- communicating,
- interacting with others, and
- working.

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Rules of the Game
ADA: Qualified Individual with a Disability

Qualified individual with a disability is defined as an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position the individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

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Rules of the Game
ADA: Reasonable Accommodation

Reasonable accommodations include but are not limited to:

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
- job restructuring;
- part-time or modified work schedules;
- reassignment to vacant positions;
- acquisition or modifications of equipment or devices;
- appropriate adjustment or modifications of examinations, training materials, or policies; and
- the provision of qualified readers or interpreters.

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Rules of the Game
ADA: Undue Hardship

Factors considered in assessing whether an accommodation constitutes an undue hardship include the:

- nature and net cost of the accommodation;
- overall financial resources of the facility involved;
- overall financial resources of the covered entity itself, including the overall size of the business, number of its employees, and location of its facilities;
- type of operation of the covered entity; and
- impact of accommodation upon the operation of the facility, including the impact on the facility's ability to conduct business.

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Rules of the Game
ADA: Extended Leave of Absence

The Sixth Circuit has declined to adopt a per se rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a "reasonable accommodation." *See Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998). *See, also*, *Cleveland v. Federal Express Corp.*, 83 Fed. Appx. 74, 78 (6th Cir. 2003) (noting that the Sixth Circuit has "declined to adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation" and, therefore, the plaintiff's requested six-month leave could be a reasonable accommodation for her lupus).

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Rules of the Game
ADA: Notice

Employee must put employer on notice of his/her disability and need for an accommodation; but employee need not mention the ADA or specifically ask for an "accommodation."

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Rules of the Game
ADA: Medical Documentation

Employer may request medical documentation in connection with an employee's accommodation request.

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Rules of the Game
ADA: Reinstatement

Employer must restore the employee to the original position unless it would impose an undue hardship to hold the original position open while the employee is on leave.

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Rules of the Game
Pregnancy Discrimination Act

The PDA amended Title VII of the Civil Rights Act, which prohibits discrimination against individuals because of their race, color, religion, sex, or national origin, by defining the phrase "because of sex" to include because of "pregnancy, childbirth, or related medical conditions."

The PDA provides that women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

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Rules of the Game
Intersection of the PDA, FMLA, and ADA

- **PDA**: leave of absence related to pregnancy, childbirth, or related medical conditions if leaves of absence are provided to other individuals with temporary disabilities.
- **FMLA**: leave of absence for period of incapacity due to pregnancy, or for prenatal care if employee has worked for the employer for at least 12 months and at least 1250 hours during the 12 months preceding the leave, and is employed at a location where there are at least 50 employees within a 75 mile radius.
- **ADA**: a normal pregnancy absent complications substantially limiting a major life activity is not considered a disability under the ADA requiring a reasonable accommodation.

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Rules of the Game
Workers' Compensation

Provides coverage for work-related injuries or occupational diseases.

Employers are encouraged to create light-duty assignments in order to transition employees back to work.

Does not guarantee job protection. *See Bickers v. Western & Southern Life Ins. Co.*, 116 Ohio St.3d 351, 357 (2007).

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Rules of the Game
Workers' Compensation: Notice

Employee must notify employer of any work-related injuries.

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Rules of the Game
Workers' Compensation: Reinstatement

Generally, no right to reinstatement.

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Rules of the Game
Light Duty and the Intersection of Workers' Compensation, the FMLA, and the ADA

- **Workers' Compensation**: Employee who refuses a light duty assignment is no longer entitled to wage replacement benefits.
- **FMLA**: Employer cannot require an employee with a serious health condition to accept a light duty assignment in lieu of taking an FMLA leave of absence. If the employee accepts a light duty assignment, the time spent in the light duty assignment does not count against the employee's 12-week FMLA entitlement.
- **ADA**: Employer is not required to create a light duty assignment for an employee with a disability; however, a light duty assignment can constitute a reasonable accommodation under the ADA.

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Rules of the Game
Reinstatement and the Intersection of the FMLA and the ADA

What are your reinstatement obligations to an employee who has a serious health condition under the FMLA which also constitutes a disability under the ADA?

Must provide for whichever has the greater rights.

Therefore, you must restore the employee to his/her original position unless you can show that an undue hardship prevented you from holding the position open, in which case, you must restore to an equivalent position.

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Rules of the Game
Company Policies

When addressing leaves of absence, don't forget about Company policies, including Short-Term Disability, Long-Term Disability, and Personal Leaves of Absence.

Be sure to apply all policies consistently in order to avoid discrimination claims.

In addition, consider how call-in procedures will apply to employees taking leaves.

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Unsportsmanlike Conduct
Maximum Leave Policies & "No Fault" Attendance Policies

Such policies may need to be adjusted or modified for individuals with disabilities.

Headline: … to Pay $20 Million to Settle Nationwide EEOC Disability Suit – Largest ADA Settlement in EEOC History for Hundreds of Employees Terminated or Disciplined Based on Rigid Attendance Policy. *See* 7-6-11 EEOC Press Release.

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Overview

	FMLA	ADA	PDA	Workers' Comp
Coverage	Employers with 50 or more employees	Employers with 15 or more employees	Employers with 15 or more employees	All employers
Eligibility	Must have worked at least 12 months and at least 1,250 hours in the 12 months preceding the leave at a location where there are at least 50 employees within a 75 mile radius	Must be a qualified individual with a disability	Women affected by pregnancy, childbirth, or related medical conditions	All employees
Conditions	Serious health condition of employee or immediate family member, birth or adoption, qualified exigency, military caregiver	Impairment that substantially limits a major life activity, record of such an impairment, being regarded as having such an impairment	Pregnancy, childbirth, or related medical conditions	Work related injury or occupational disease

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Overview

	FMLA	ADA	PDA	Workers' Comp.
Protection	12 weeks of leave in 12-month period (26 weeks for military caregiver)	Reasonable accommodation	Equal treatment for all employment-related purposes, including receipt of benefits under fringe benefit programs	Wage replacement during period of incapacity
Notice	30 days notice of leave is foreseeable If not foreseeable, as soon as practicable	Notice of disability and need for accommodation but need not specifically ask for an accommodation	Not applicable	Notice of any work-related injuries
Reinstatement	Original or equivalent position	Original position absent undue hardship	Depends upon leave of absence policies and whether the FMLA or ADA are implicated	Not applicable

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Reasonable Accommodations
Issues That Frequently Arise

- Access Entries
- Leave of Absence
- Modified or Part-Time Work Schedule
- Policy Modification
- Supervisors
- Working at Home

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ADA: Service Animals

- ADA defines a service animal as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." 28 C.F.R. § 36.104.
- Title III of the ADA:
  - Is the animal required because of a disability?
  - What work or task has the animal been trained to perform?

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ADA: Service Animals

- A business may demand a dog be removed from the premises if (1) the animal is out of control and the handler does not take action to control it, and (2) the animal is not housebroken. 28 C.F.R. § 35.136(b).
- Dogs that only provide comfort or emotional support do not qualify as service animals.

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ADA: Scent-Free Environments

- Although employers are not required to provide a scent-free workplace under the ADA, they may be required to prohibit certain fragrances or products.
  - Reasonable accommodation: asking employees to refrain from wearing strong fragrances and offering the complaining employee leave when he experienced migraines.
  - Reasonable accommodation: prohibiting workers from making popcorn in the workplace to accommodate employee with a corn allergy.
  - Reasonable accommodation: providing a partial face respirator to a lab assistant who reacted negatively to certain chemicals.

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ADA: Telecommuting

- Telecommuting: (1) working at home by using a computer terminal electronically linked to one's place of employment or (2) a work arrangement in which employees do not commute to a central place of work.

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ADA: Telecommuting

- EEOC v. Ford Motor Co. (6th Cir. 2015)
  - Facts: Plaintiff was a steel "resale buyer." Plaintiff's job required her to purchase steel on behalf of Ford and sell it to the parts manufacturers who then supplied parts for the assembly line. Ford claimed Plaintiff's position required in person visits and interaction at the manufacturing sites. Plaintiff suffered from irritable bowel syndrome and requested to work from home for up to four days per week.
  - Ruling: the company did not violate the ADA by refusing to allow a disabled employee to telecommute as a reasonable accommodation.
    - Summary Judgment for Ford.

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ADA: Leaves of Absence

- In order for an accommodation to be considered reasonable, courts look at (1) whether the proposed accommodation will be effective – efficiently enable the employee to perform the essential functions of the job – and (2) whether the accommodation is reasonable "in the run of cases" – reasonable for a general, ordinary employer under the circumstances.

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ADA: Leaves of Absence

- An accommodation is reasonable if the costs are not clearly disproportionate to the benefits it produces.
- Employee must establish: (1) the proposed accommodation would enable him/her to perform the essential functions of the job; and (2) that the accommodation would be feasible for the employer to grant under the circumstances.

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ADA: Leaves of Absence

- Requested recovery time of unspecified duration may be classified as unreasonable.
  - Will the employee be able to return to his/her former position?
  - Can the employee state when, and under what conditions, he/she could return to work, if at all?
- Determination is based on an individualized, case-by-case assessment.
- Factors to consider: (1) amount of time requested; (2) degree of certainty of the employee's ability to return to work on the specified date; and (3) employer's written policies.

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ADA: Leaves of Absence

- Treatment and recuperation do not always permit exact timetables, so in certain situations, an employee may be able to provide only an approximate date of return.
  - EEOC: an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return.
- Leave more easily becomes an undue hardship when a defendant can clearly show that regular and predictable attendance is more critical in this job than the average job – such as being part of a small-group team.

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Recent Case: Interactive Process
Huge v. Boeing (2015)

- Former employee of Boeing, who suffered from an autism spectrum disorder as well as other social and cognitive disabilities, brought suit against the company alleging it failed to provide her with a reasonable accommodation.
- Plaintiff demanded that she receive all her instructions in writing. She submitted medical documentation in support of her request.

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Recent Case: Interactive Process
Huge v. Boeing (2015)

- Court ruled in favor of Boeing, finding the company had "spent great time and effort to engage in the interactive process."
- The company provided Plaintiff with written job instructions, job coaches, and unpaid leave. These accommodations were developed after "lengthy consultations" between legal representatives, physicians, and human resource representatives.

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Recent Case: Interactive Process
Huge v. Boeing (2015)

- Plaintiff's discrimination and retaliation claims failed because her repeated failure to act in good faith (by making contradictory requests, delaying and obstructing the process, and focusing on building a lawsuit against the company) removed the company's obligation to provide a reasonable accommodation.
  - Also provided a legitimate, non-discriminatory reason to terminate her employment.

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Thank you!
Any Questions?

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