

# Traversing the Spooky Triangle: The Intersection of Intersection of Worker's Compensation, OSHA and Leave

October 2, 2025

Presented by:

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# Roadmap

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## Issue-Spotting: What Laws to Consider After a Workplace Injury?

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### Hypothetical Scenario

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### Best Practices for Compliance

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# The Rules

# Injury Claim Interplay

- Employment laws involved in injury claims
  - ADA
  - FMLA
  - FLSA
  - GINA
  - HIPAA
  - OSHA
  - COBRA
  - ERISA
  - Medicare
  - Worker's Compensation

# Determining Which Laws Apply

## Worker's Compensation

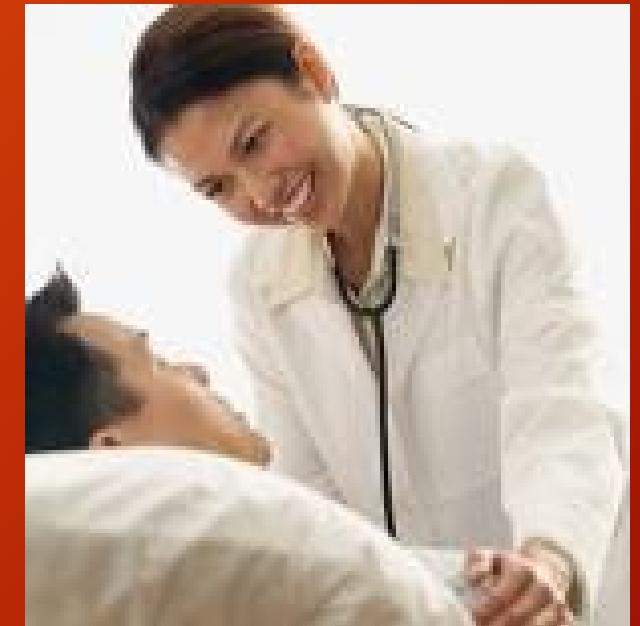
- All SC employers with 4 or more employees
- Compensation for injury, including periods of disability
- Anti-retaliation

## OSHA

- Under SC OSHA law, generally ALL employers
  - Reporting
  - Recording (11 or more employees)
  - Anti-retaliation

# Determining Which Laws Apply

- Family and Medical Leave Act (FMLA)
  - Private employers with 50 or more employees in a 75 mile radius
  - All Public employers, regardless of size
  - Employees with “serious health conditions” who:
    - Have been employed for 12 months or more (does not need to be consecutive); and
    - Worked at least 1250 hours for the employer during the 12 months immediately preceding the leave
  - Provides job security during leave periods (up to 12 weeks)
  - Leave is unpaid unless company-provided leave is available



# Determining Which Laws Apply

- ADA – Americans with Disabilities Act
  - Public and private employers with more than 15 employees
  - Length of service irrelevant
    - Applies to applicants too
  - Requires employers to make reasonable accommodations for “disabled” but otherwise qualified individuals
  - “Reasonable” job protection
    - Tier 1 (in-job)
    - Tier 2 (leave)
    - Tier 3 (vacant position)



# Dealing with the Leave Overlap

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Analyze and consider employee's rights and benefits under each law

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The key is knowing that more than one law may apply

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Rule of Thumb - if more than one applies - follow the law that provides the most protection to the employee

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Remember that FMLA leave availability does not remove the duty to engage in the interactive process for ADA accommodations



# Here's the Situation ...



# Scenario - The Players

- Charlie is a full-time, hourly employee
- Senior Care, Inc., is the Employer
- Charlie is the Activities Director for Senior Care's AL facility in Columbia
- Charlie's Supervisor is Linus



## And So, It Begins...

- On Tuesday, before work, Charlie tells Linus that while he was decorating for the Halloween party on Monday, he hurt his back lifting a very large (perhaps great) pumpkin



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Charlie went to urgent care after work on Monday

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Doctor's note says: "light duty until seen by orthopedist for possible herniated disc"

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What should Linus be thinking about/how should he respond?

# Get the Story Straight

Have employee document the injury

- What were they doing
- When did they do it
- Nature and onset of symptoms
- Prior problems with current condition
- Names of any witnesses



# Claims Handling

- What else should you do following an accident?
  - *Document, document, document!*
  - Investigate immediately
  - Interview witnesses
  - Gather witness statements
  - Take photos (if applicable)
  - Review video footage

# What's Next?

# OSHA - 3 Considerations

## Record?

- Injuries requiring medical treatment beyond first aid
- Lost time, restricted duty or re-assignment

## Report?

- Serious injuries (fatality, amputation, loss of an eye, in-patient hospitalization)
- 8 hours for fatality
- 24 hours for all others

## Retaliation

- OSHA may sue in name of employee

- Workers Comp?
  - In the course and scope of employment?
  - Form 12A
    - Workplace injury claims should be reported using the Form 12A
    - If the injury requires less than \$500 and does not cause more than a lost workday or permanency, the employer can pay for the treatment directly and does not need to fill out a Form 12A
    - Any other workplace injuries must be reported in 10 days
    - Submitting a Form 12A is not an acceptance of liability; however, always reflect “alleged” if questionable
- Leave?
  - Not there yet

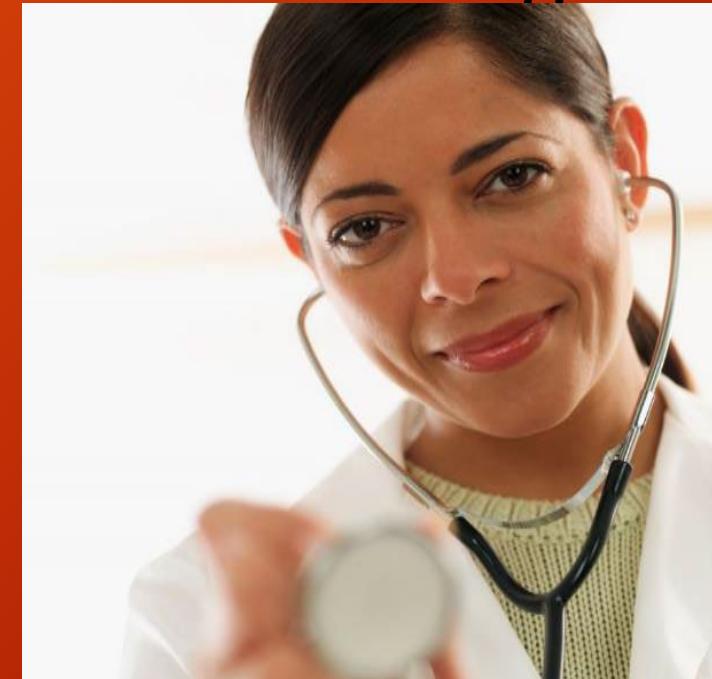
# Moving On

# Charlie Is Seen By “Company” Physician

- Charlie is sent to company doctor on Wednesday, the day after he reported the injury
- Report to Linus from company doctor
  - Potential herniated disc
  - Avoid work until seen by specialist on following Monday
  - Problem appears work-related
- Linus’ Next Move?

# Employee is Written “Out” of Work

- On Monday, orthopedist confirms herniated disc in lower back
- No reason to doubt injury resulted from lifting the pumpkin at work
- Out of work for 4 months
- What should Linus do?
  - FMLA/ADA (PTO?) (TTD?)



# Employee Is Released

- Charlie is released after 4 months of no work
  - Restricted duty
  - Lift no more than 15 lbs.
  - Restrictions apply indefinitely
- Effectively MMI with Permanent Restrictions

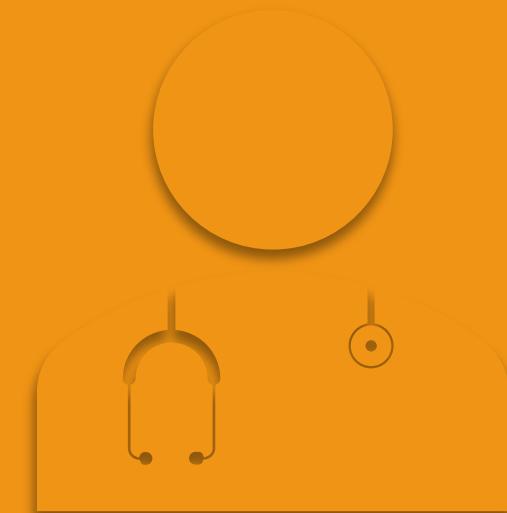
# Closing the Loop (Linus' Next Steps)

# Return to Work Physical Exams

- ADA
  - Exams are allowed post-hire when job-related and consistent with business necessity (fitness for duty (FFD)) – also applies in RTW situations
  - ADA exams (FFD & RTW) should be narrowly tailored to the actual medical condition at issue, focus on the job duties of the position held and whether accommodation is necessary to perform the job
- FMLA
  - Medical certification may be obtained prior to RTW – MUST be applied uniformly as well as job-related and consistent with business necessity (see ADA)
  - Generally, the employer is only allowed to obtain a simple statement that employee is suitable for RTW
  - Notify employee at time of leave that RTW note will be required if you intend to require one (be consistent)

# Access to Information

- If WC applies, employer will have automatic access to a much broader range of medical information and the ability to ask more questions
  - careful about what you ask and make sure you really need to know the answer (GINA prohibition on genetic information)
  - What you know under WC likely imputed to the employer for ADA and FMLA purposes



# W/C Claims Resolution Strategy

- Resolving Claims
- “Clincher” Agreements
  - You’re Done
- Formal Hearings

# Employee's Right to Former Position

- FMLA
  - Job protection law
  - No absolute right to former position – equivalent position only
- ADA
  - INTERACTIVE PROCESS
    - Tier 1 (in job)
    - Tier 2 (more leave)
    - Tier 3 (re-assignment)

# Key Takeways

**PLAN FIRST!**

- Investigate promptly and document
- Be mindful of OSHA obligations
- Any injury/leave situation should be analyzed under each law
- Follow the statute (FMLA/ADA) that offers the employee the *greatest* benefits
- Follow the ADA interactive process for restrictions and leave

# Questions?



# Thank You!



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