

# 2021 Safety Webinar

## **SPEAKERS**

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- Lauri Cochran - Comprehensive Risk Management, LLC
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# VSSR

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## Safety Violations

Defending Allegations of a Violation of a Specific Safety Requirement "VSSR"

## What is a VSSR?

- Comes from the Ohio Constitution (Article II, Section 35)
- Industrial Commission has authority to determine whether an injury resulted because of the failure of the employer to comply with any regulation designed to protect employees

## What is a VSSR?

- A VSSR is an exception to the general rule that **fault** is not relevant in a workers' compensation claim

## What is a VSSR?

- Workers' Compensation was designed as a "bargain" between employees and employers
  - Employees do not have to prove wrongdoing by their employer
  - Employees are limited to a defined set of benefits

## Intentional Tort

- If an employee can establish an “intentional tort” the employee can bring suit against the employer outside of the workers’ compensation system

## O.R.C. §2745.01

- The employee must establish that the employer committed the tortious act with the:
  - Intent to Injure the Employee; or
  - Belief that the injury was substantially certain to occur
    - “Substantially certain” means the employer acted with deliberate intent to cause injury

## Three Elements of a VSSR

- 1) the machine or situation in question is one that is covered by the code section cited;
- 2) the code section was violated; **and**
- 3) the violation was the proximate cause of the injury.

## VSSR Awards

- If the Industrial Commission makes a VSSR award, it will assign the award a percentage between **15%** and **50%**, based upon the severity of the violation.

## VSSR Awards

- To calculate the amount of the award, **multiply the VSSR percentage by the number of weeks of indemnity compensation** (temporary total disability, permanent partial disability, etc.) paid in the claim, **at the maximum rate for the year of injury.**

## VSSR Awards

- Because a VSSR award is a penalty, it is not affected by the fact that an injured worker has a low average weekly wage.
- The greater number of weeks of indemnity compensation paid in the claim, and the greater VSSR percentage, the greater the award.

## Strict-Construction

- All reasonable doubts in the interpretation of the safety requirement are to be **interpreted in the employer's favor**
- Applies to interpretation of the O.R.C. section only, not factual determinations

## Grandfather Clause

- The code section in place at the **time the machinery was installed** controls

# VSSR Code Sections

- 4123:1-1 Operation of Elevators
- 4123:1-3 Construction
- 4123:1-5 Workshops and Factories
- 4121:1-7 Metal Casting and Foundries
- 4123:1-9 Steel Mills
- 4123:1-11 Laundry and Dry Cleaning
- 4123:1-13 Rubber and Plastic Industries
- 4123:1-17 Window Cleaning

# Defending A VSSR Application





## VSSR Defenses

- **Defending LeBron James is impossible (aka the impossibility defense)**

## VSSR Defenses

- In order to establish impossibility as a defense, the employer must show:
  - 1) that it would have been impossible to comply with the specific safety requirement, or that compliance would have precluded performance of the work; and
  - 2) that no alternative means of employee protection existed or were available.

## VSSR Defenses

- **My contract doesn't allow me to defend LeBron (aka no authority to alter or correct)**
- The employer must have the authority to alter or correct a VSSR Violation in order to be held to be liable for it.

## VSSR Defenses

- **It's my first NBA game, give me a break! (aka a one time event with no knowledge of the condition)**

## VSSR Defenses

- If the employee was injured as a result of a single one-time event **and** the employer had no knowledge of the defective condition, a VSSR will generally not be found.

## VSSR Defenses

- **Maybe LeBron will go to the wrong arena (aka the employee cited the wrong code)**

## VSSR Defenses

- Specific Safety Requirements are strictly construed in favor of the employer. One of the elements that a claimant must prove is that the machine or situation in question is one that is covered by the code section cited
- If this is not a machine or a situation that is covered by the cited code section, there can be no violation.

## VSSR Defenses

- **What do you mean, defend LeBron???? (aka the undefined or vague definition defense)**
- If the Administrative Code does not define the relevant apparatus and a cited provision refers to equipment that is not part of the machine in question, it is an abuse of discretion to apply that requirement to the employer.

## VSSR Defenses

- **It's the other guy's fault that LeBron scored 45 points (aka the unilateral negligence defense)**

## VSSR Defenses

- There must be no negligence and no fault to be assessed against the employer for the unilateral negligence defense to prevail.
- If the employer is partly responsible for the accident in any way, the unilateral negligence defense will not apply.

## VSSR Defenses

- **LeBron is too old, this will be a breeze (aka the one year limitation)**

## VSSR Defenses

- **Best case scenario, you could just shut LeBron down in the game (aka compliance with the code)**

## BWC Updates – July 2021

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## Dividends

- Dividends
  - \$8B returned to employers in 2020
    - April -- \$1.6B
    - October – \$1.5B
    - December -- \$5B
  - 100% of premium was returned for the 2018 policy year
  - 100% of premium returned for 2019 policy year
  - 375% of premium returned for 2019 PY

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## Dividends

- Retro Refund Impact
  - No retro program refunds for the 2018 or 2019 policy years
  - BWC refunded all premiums paid
  - Performance will still be tracked
- Future Refunds?
  - BWC's net position as of 5/31 was \$9B
  - Slightly over-funded

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## Payroll True-Up

- Payroll true-ups due by August 15, 2021
  - For 7/1/20 – 6/30/21 policy year
- Additional premium generated from the true-up needs to be paid by August 15
- Any overpayment will be applied to outstanding balances

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# Covid-19 Vaccination Program

- COVID-19 Vaccination Program
  - BWC teamed up the Department of Health to offer vaccination pop-up clinics
  - How It Works information is provided on the next slide
  - Contact me for further info

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# Covid-19 Vaccination Program

## COVID-19 Vaccination Program for Businesses and Organizations

Connecting vaccine providers with local employers and organizations to bring vaccines conveniently to communities.

Ohio's COVID-19 Vaccine Program encourages enrolled vaccine providers to support employer or organization vaccine programs. This includes providers partnering with businesses or organizations to conduct private vaccination clinics for businesses and organizations, making it easy and convenient for employees or members of organizations to be vaccinated.

### How to set up a vaccine clinic

- 1. Survey**
  - Use a survey to estimate how many people plan to get the vaccine through the clinic.
- 2. Find a provider partner**
  - Don't know where to start? Check out [ODH's Provider Partners List](#).
- 3. Set a date**
  - Work with your provider partner to set a date for your clinic.
  - Allow time during the work day to vaccinate. This is a fast, simple and effective way to vaccinate Ohioans and make the workplace safer.
- 4. Vaccinate!**
  - Share your stories about on-site vaccines clinics using social media.
  - Use the hashtag #InThisTogetherOhio

### Additional Resources

- [ODH Guidance for Organizations Vaccinating Employees & Members](#)
- [List of Vaccine Providers Available to Partner with Businesses/Organizations](#)
- Enrolled Provider? Get added to the Provider Partners List via [survey](#).

More information is available on the [COVID-19 Vaccination Program for Businesses and Organizations webpage](#).

COVID-19

Ohio Department of Health

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## Workplace Wellness Grant Program

- Purpose of the program
  - Health-risk appraisal and biometric assessment
  - Programs to address any risk factors
  - Eligibility for the grant
    - Any state fund employer without a wellness program can participate
    - Must be current on BWC premiums

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## Workplace Wellness Grant Program

- Workplace Wellness Grant Program
  - Up to \$300 per participating employee (over 4 years) in grant money
    - Must complete an HRA and Biometric Screen
    - Also must complete at least one activity per program year
      - Ex: smoking cessation, weight loss challenges, etc.
  - Maximum of \$15,000 per policy over the 4 year period
  - BWC site under Employers -- Safety & Training -- Safety Grants – Workplace Wellness

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## Substance Abuse Recovery & Workplace Safety Program

### ● What is it?

- Created in conjunction with various county Alcohol, Drug Addiction and Mental Health Boards
- Established to assist employers in hiring or retaining workers who are in recovery

Participating counties

Allen	Athens	Auglaize	Clark
Crawford	Cuyahoga	Greene	Hamilton
Hardin	Hocking	Lorain	Madison
Mahoning	Marion	Montgomery	Sandusky
Seneca	Summit	Union	Vinton
Washington	Wyandot		

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## Substance Abuse Recovery & Workplace Safety Program

### ● Requirements

- Located in a participating county
- Current on BWC payments
- Active policy status
- True-up completed
- Self insured employers are not eligible

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## Substance Abuse Recovery & Workplace Safety Program

- How it works:
  - BWC awards funds to ADAMH board up to \$200,000 at a time then additional funding once account is below \$10,000
  - Participating employers pay expenses up front
    - Reimbursement requested through the county ADAMH board
    - This is first come, first served basis
    - Resources are available but funding can be suspended at any time
    - Invoices and proof of payment are required

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## Substance Abuse Recovery & Workplace Safety Program

- What is covered:
  - Development/legal review of employer policies and procedures on substance use issues
  - Training for employees
  - Training for supervisors
  - Drug testing for prospective employees and current employees in recovery
  - Must be performed by recognized vendor

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## Substance Abuse Recovery & Workplace Safety Program

- Reimbursement amounts:
  - Up to \$2,000 for policy development
  - Up to \$500 for legal review of policy
  - Up to \$21,600 (annual max)
    - 72 hours of training at \$300 per hour
  - \$100 max per qualitative test and \$200 max per quantitative test.

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## Substance Abuse Recovery & Workplace Safety Program

Appendix B  
Reimbursable Expenses Chart

Drug testing*	Actual cost up to a maximum of \$100 for a qualitative drug screen, including pre-employment, post-accident, random, reasonable suspicion, and return-to-duty testing
Drug screenings for eligible employees	Actual cost up to a maximum of \$200 for a quantitative drug screen, including confirmatory testing
Employee training*	Actual cost up to a maximum of \$300 per hour (annual maximum of \$21,600) for up to 72 hours of training in one year
Legal review	Actual cost up to a maximum of \$500 for a one-time annual legal review of employer policies
Annual review	Actual cost up to a maximum of \$500 for legal review of employer policies
Initial legal review	Actual cost up to a maximum of \$1,000 for a one-time annual review of employer policy
Policy development*	Actual cost up to a maximum of \$2,000 of initial policy development
Initial policy development	Actual cost up to a maximum of \$1,500 for a one-time annual review of employer policies in conjunction with legal review
Policy development* with legal review	Actual cost up to a maximum of \$2,500 of initial policy development in conjunction with legal review
Initial policy development with legal review	Actual cost up to a maximum of \$300 per hour (annual maximum of \$21,600) for up to 72 hours of training in one year
Supervisor training*	Actual cost up to a maximum of \$300 per hour (annual maximum of \$21,600) for up to 72 hours of training in one year
BWC will reimburse the actual cost up to the amount specified for each of the above properly documented services, subject to the parameters contained within Section IV.D of this policy.	
* All services must be provided by a vendor recognized in the <a href="#">Drug Free Safety Program vendor list</a> .	

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## BWC Related Websites

- Workplace Wellness
  - <https://info.bwc.ohio.gov/wps/portal/gov/bwc/for-employers/safety-and-training/safety-grants/workplace-wellness-grant>
- Substance Abuse
  - <https://info.bwc.ohio.gov/wps/portal/gov/bwc/for-employers/workers-compensation-coverage/rates-and-bonuses/OpioidWkplaceSafety>

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## Covid-19 Claims

- COVID-19 claims
  - BWC will exclude all COVID claims from employer rate calculations
  - This will be added as section (4) to Ohio Revised Code 4123-17-03

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## Closing

- Questions?
- Direct Dial - (216) 643-4532
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## OSHA And Workplace Safety

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## OSHA Accident Reporting Changes

- Old Rule (Effective 2001)
  - Report fatalities within 8 hours
  - Report in-patient hospitalization involving 3 or more employees within 8 hours
- Current Rule (Effective January 1, 2015)
  - Report fatalities within 8 hours
  - Report in-patient hospitalizations of a single employee, amputation, and/or eye loss incidents within 24 hours

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## OSHA Accident Reporting Changes

- In-patient hospitalizations
  - Formal admission to the in-patient service of a hospital or clinic
- Amputations
  - Traumatic loss of limb or other external body part
- What happens after a reported incident?
- Failure to report citations
- Status of post-accident drug testing

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## OSHA Penalty Structure

- 2010 Changes
  - Categories are “willful”, “repeated”, “serious”, “non-serious” and “de minimis”
    - Assessed based on gravity, business size, good faith of employer and citation history
    - Gravity is the primary consideration
    - Civil penalties can be incurred for failure to abate or failure to comply
    - Criminal penalties also possible per Section 17(g) of the Act

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## OSHA Penalty Structure

- Adjustments to penalties
  - Prior to 2010, penalties had not been adjusted for decades
  - Changes in penalty structure announced April 22, 2010 and became effective October 1, 2010

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## OSHA Penalty Structure

- Adjustments to penalties
  - Repeat Violations
    - Prior to 2010 – proposed if final order citation issued in previous three years
    - As of October 2010 – proposed if final order citation issued in past five years
  - Informal Conference Penalty Considerations
    - Pre 2010 – Area Director could reduce penalty up to 50% (Regional approval required for greater than 50%)

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## OSHA Penalty Structure

- Adjustments to penalties
  - Post October 2010
    - Area Director can reduce penalty up to 30% - approval required
    - Additional 20% reduction if outside H&S consultant is hired
  - Impact on bidding/disclosure of OSHA history
  - Impact on EMR
  - Free discovery for potential VSSR claim

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## OSHA Defenses

- Compliance is best defense
  - Prima facie case must be established by OSHA
    - Cited standard is applicable
    - Employer failed to comply
    - Employees were exposed
    - Employer knowledge – actual or constructive

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## OSHA Defenses

- To established prima facie case, OSHA may utilize:
  - OSHA Field Operations Manual
  - Directives
  - Letters of interpretation
  - Multi-employer policy
- Certain affirmative defenses may be available if prima facie case is established

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## OSHA Defenses

- Isolated Employee Misconduct
  - Unpreventable Employee Misconduct or “Isolated Event”
    - Unknown to the employer; and
    - Violation of adequate work rule which was communicated and enforced

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## OSHA Defenses

- Isolated Employee Misconduct
  - Employer must prove:
    - Work rules for prevention were established
    - Work rules were adequately communicated
    - Steps were taken to discover violations
    - Rules were enforced when violations occurred
  - Employer should have:
    - Work rules and safety policies which are communicated and enforced

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## OSHA Defenses

- Employer should have:
  - Work rules and safety policies which are communicated and enforced
  - Safety rules must address the hazard at issue
  - Burden of safety training and enforcement is on the employer
  - Isolated employee misconduct cannot be raised when a supervisor has knowledge or participates in unsafe act or condition

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## OSHA Defenses

- Infeasibility Defense
  - OSHA Compliance Manual defines infeasibility/impossibility as: Compliance with the requirements of a standard is:
    - Functionally impossible or would prevent performance of required work
    - No alternative means of employee protection

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## OSHA Defenses

- Infeasibility Defense
  - OSHA must prove technological and economic feasibility of particular engineering and administrative controls
    - Employer may assert an affirmative defense that it is not feasible to comply with a particular standard
    - Employer has the burden to establish that an alternate protective measure was used or that was no feasible measure available

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## OSHA Defenses

- Infeasibility Defense
  - Debate has been whether there should be a test of Infeasibility or Impossibility
    - Case law has favored that employers prove only infeasibility
  - Economic considerations have no bearing on this defense
  - Feasibility/Infeasibility is the most difficult to establish

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## OSHA Defenses

- Greater Hazard
  - OSHA Compliance Manual Definition
    - Compliance with the standard would result in greater hazards to employees than non-compliance
      - No alternative means of employee protection
      - Application of variance would be inappropriate

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## OSHA Defenses

- Greater Hazard
  - Elements of greater hazard
    - Hazards of compliance greater than hazards of non-compliance
    - Alternative means of protecting employees are unavailable
    - A variance application to OSHA would be inappropriate
      - What is a variance application?
      - How does it help?

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## OSHA and VSSR Cases

- Can OSHA violations be used as evidence in VSSR cases?
  - Case law holds that the Industrial Commission can rely on OSHA citations in assessing penalties for VSSR violations
  - The IC can also rely on factual portions of the OSHA inspection

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## OSHA and VSSR Cases

- Can an OSHA investigation create a roadmap to establish a VSSR violation?
  - OSHA files can be obtained through a Freedom of Information (FOIA) request
    - Files obtained are redacted
  - OSHA's new reporting requirements create more of a record for more cases/incidents than in the past

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## OSHA and VSSR Cases

- Is there similarity between OSHA violations and VSSR allegations/code sections?
- Is there disclosure/non-admissions exculpatory language in OSHA settlement agreement?

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## OSHA and VSSR Cases

- Are there abatement requirements in OSHA settlement agreement that highlight deficiencies?
- Also look to periodic Industrial Commission safety and hygiene reports/OSHA compliance requests

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# Employment Law Concerns in Managing Injuries

Presented by:

**Lynn Schonberg**  
Ross, Brittain & Schonberg

August 3, 2021

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## Introduction

- **Effect of Workers' Compensation Law**
  - Ohio's workers' comp law does not entitle claimants to different, worse or better treatment
  - Only statutory right provided to a claimant is right against retaliation
    - Section 4123.90 prohibits discharge, demotion, reassignment or any punitive action against employees because they filed a workers' compensation claim

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## Introduction

- Equal application of policies best protection against 4123.90 action
  - All policies in handbook apply equally to all employees, including claimants
    - FMLA or Medical Leave of Absence
    - Reasonable Accommodation/Light Duty
    - Medical insurance/COBRA
    - Return to work releases
  - Claimants remain employees entitled to ***equal*** application of policies

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## Review of Employment Laws

- Family and Medical Leave Act (FMLA)
  - 50+ employee threshold
  - Provides up to 12 weeks unpaid leave
  - Continue medical insurance and right to reinstatement
  - Applies to ALL leaves, including leaves due to workers' compensation injury
    - Intermittent and reduced hour leaves included

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## Review of Employment Laws

- Americans with Disabilities Act (ADA)
  - Applies to employees with a disability
    - Disability includes walking, sitting, lifting, etc.
    - Minor, short-term conditions are not disabilities
    - But, short-term conditions with long-term complications *may* qualify as a disability
  - Disabled employee must be “qualified”
    - Must be able to perform essential functions of the job with or without reasonable accommodation

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## Review of Employment Laws

- Americans with Disabilities Act (ADA)
  - Be sure Handbook contains ADA/Reasonable Accommodation policy
    - Will assist in handling all disabled employees
  - Be sure Job Descriptions are in existence and updated
    - Best evidence of essential job functions
    - If in existence, can be provided to treating physician to determine ability to return to work

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## Review of Employment Laws

- COBRA
  - 20+ employee threshold
  - 18-month continuation medical insurance
  - Applies where lose coverage due to lack of hours or loss of employment
- Mini-COBRA in Ohio
  - Under 20 employees
  - Applies where lose coverage other than due to voluntary termination

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## Managing Leaves of Absences

- In General
  - Many industrial incidents result in a leave of absence from work
  - It is imperative that the injured employee is treated as any other employee in need of a leave
    - A workers' comp claimant is not entitled to better or preferential treatment unless a policy provides for such
    - If prefer to provide better benefits, publish a policy

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## 1<sup>st</sup> Step in Managing Leaves of Absences

- 1<sup>st</sup> Step: Determine the Leave Policy
  - Review the Employee Handbook
    - Always ensure that the Handbook is up to date
    - Always ensure that employees have signed an Acknowledgment and it is in the personnel file
  - If no handbook exists, review any written leave policies/memos, etc. that may exist
  - If no written policies exist, determine how other employees needing medical leave have been treated

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## 1<sup>st</sup> Step in Managing Leaves of Absences

- FMLA Policy
  - If the employer employs 50+ employees, the FMLA policy **must** be contained in the handbook
    - Also ensure the 8x11 FMLA poster is reproduced in the handbook
    - Ensure the regular sized poster is posted
  - Determine eligibility
    - Must have been employed 12+ months and
    - Worked at least 1250 hours in past 12 months

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## 1<sup>st</sup> Step in Managing Leaves of Absences

### ■ FMLA Policy

- If eligible, issue Notice of Eligibility Form WH – 381
  - Optional form but provides good info
  - Documents date leave to begin, etc.
  - Part B references workers' comp leaves
  - Should be mailed to employee's home address
    - Use Certificate of Mailing

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## 1<sup>st</sup> Step in Managing Leaves of Absences

### ■ FMLA Policy

- Determine whether to issue Cert. of Health Care Provider (WH-380)
  - In workers' comp cases, employer typically has full access to employee's records so oftentimes no need to issue WH-380
  - In all non-workers' comp cases, always issue
- Issue FMLA Designation Notice (WH-382)
  - Also optional but should be used in all cases
  - Provides documentation of leave

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## 1<sup>st</sup> Step in Managing Leaves of Absences

- Medical Leave of Absence Policy
  - If injured worker is not eligible for FMLA or FMLA is inapplicable, determine if a Medical Leave policy exists
  - All employers with less than 50 employees should have a general medical leave policy
    - Establishes length, benefits, documentation requirements, etc.
    - Applies to all medical leaves for any reason

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## 1<sup>st</sup> Step in Managing Leaves of Absences

- Medical Leave of Absence Policy
  - If exists and employee is eligible:
    - Draft letter to employee explaining length of leave, benefits (i.e. medical insurance), right of reinstatement, etc.
  - If no medical leave of absence exists, proceed to ADA determination
  - **Note:** In absence of written leave policy, must have a Maternity Leave policy
    - OCRC regulations require "reasonable leave" which is 12 weeks

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## 1<sup>st</sup> Step in Managing Leaves of Absences

- If no Policy Exists, ADA is Applicable
  - Must provide a reasonable accommodation if the injured worker is disabled
    - Reasonable accommodation in this case is a reasonable leave – typically 12 weeks
    - You can decide on the benefits to provide, using prior medical leaves as your guide
    - Remember the no retaliation law – treat the injured claimant the same as others in need of a medical leave
    - Send letter explaining leave, etc.

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## 2d Step in Managing Leaves of Absences

- **DO NOT FORGET ABOUT LEAVE**
  - Issue letter to employee near end of initial leave period
    - Remind that leave is ending
    - Request medical information on ability to return to work or if cannot, require medical information
    - Require response within certain time period – 5 to 7 days after date sent
    - Send by certificate of mailing

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## 2d Step in Managing Leaves of Absences

- **DO NOT FORGET ABOUT LEAVE**
  - If employee needs additional leave of a month or less, always provide it
  - Always considered reasonable under ADA
    - Depending on medical coverage contract, may need to issue COBRA notice
  - If employee needs more than 1 month
    - Consider whether reasonable
    - Be sure that others have not been granted such long leaves in the past

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## 2d Step in Managing Leaves of Absences

- **DO NOT FORGET ABOUT LEAVE**
  - If employee needs indefinite leave, deny
    - ADA law states that in virtually all cases, an indefinite leave is unreasonable
  - If employee can return to work with restrictions, must compare with job description and determine whether it is reasonable to accommodate employee
    - If have different position for which he is qualified, may transfer to comparable job

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## 2d Step in Managing Leaves of Absences

- **DO NOT FORGET ABOUT LEAVE**
  - If unable to accommodate restrictions and no other job available
    - Must determine how long the restrictions will last
    - Determine whether extension of leave is reasonable
  - If extend leave, write letter stating length of extension, medical insurance status, etc.

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## Ending Employment

- **Unreasonable Extension of Leave**
  - Where leave becomes unreasonably long, must separate from employment
  - Issue letter containing:
    - Reason for separation
    - Date that medical coverage will end
    - Invite to reapply for employment when he is able to return to work, with or without an accommodation

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## Ending Employment

- Issue COBRA
  - Extremely important last step
- Handling Requests for Reemployment
  - If position is vacant for which former employee is qualified, rejection could result in litigation
    - Highlights importance of applying policies during employment and documenting performance deficiencies

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## Creating the Record

- Following the 3 steps will ensure:
  - All applicable leave to which employee is entitled was provided
  - FMLA rights exhausted
  - Reasonable accommodation obligation met
  - Injured employee treated same as all other similarly situated employee
- Such a record creates exceptional defense

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## The End

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### For Further Information Contact:

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