

WALKING THE TIGHTROPE: WORKERS'
COMPENSATION AND DISABILITY ACCOMMODATION
**PRACTICAL TIPS ON MANAGING LEAVES OF ABSENCE,
RETURN TO WORK, PRIVACY, AND “ACCOMMODATION”
OBLIGATIONS**



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Why are Cross-Over Issues Between W/C and Civil Claims Such a Big Issue?

- Directly Relates to Management of your Entity's Workforce and Operations
 - Morale
 - Workplace Assignments
- Directly Relates to your Liability and Workers' Compensation Premiums/Contributions
- Directly Relates to Litigation/Claim Distractions from Other Important Factors
- Directly Relates to Privacy Obligations, Probably the Hottest Topic Across Most Many Organizations

Total Employment Complaints Filed by DFEH in 2014 – 7,632 Total Cases

Age - 40 or Over	4,338
Association with a Member of a Protected Class	1,652
Disability - Mental and Physical	11,060
Engagement in Protected Activity	6,238
Family Care or Medical Leave	3,973
Marital Status	456
National Origin/Ancstry	3,421
Other	2,440
Race/Color	6,488
Religion	736
Retaliation	12,344
Sex - Gender Identity/Expression	439
Sex - Genetic Information	447
Sex - Harassment	4,312
Sex - Orientation	921
Sex - Other Allegations	5,134
Sex - Pregnancy	1,181
Totals	65,338

DFEH Settlement Exposures

Calendar Year	Number of Settled Cases	Enforcement Division	Number of Settled Cases	Legal Division
2011	670	\$7,818,762	55	\$2,742,933
2012	470	\$5,219,464	744*	\$8,214,458
2013	398	\$4,047,606	39	\$1,721,277
2014	280	\$3,470,910	32	\$9,740,961

DFEH Employment Complainants' County of Residence

County	2011	2012	2013	2014
Alameda	880	785	734	709
Fresno	509	410	364	373
Los Angeles	6043	5099	6236	5889
Orange	1413	1111	1445	1400
Riverside	720	676	744	720
Sacramento	863	884	831	848
San Diego	1107	954	1099	1141
Santa Clara	732	533	544	422
San Francisco	469	398	496	553

Latest DIR Report on Workers' Compensation Filings

- The incidence of occupational injuries and illnesses in California remain at their lowest level in 13 years
- Survey of Occupational Injuries and Illnesses (SOII)
 - 2014 – 460,000 reportable injury and illness cases
 - 2013 – 468,400 reportable injury and illness cases
- The rate for cases involving lost work-time, job transfer, or restriction-from-duty cases held steady at approximately 265,000 cases
- The rate for cases involving days away from work fell from 146,800 to 142,800
- Overall, the incidence of nonfatal occupational injuries and illnesses in California remains at its lowest level in the past decade.

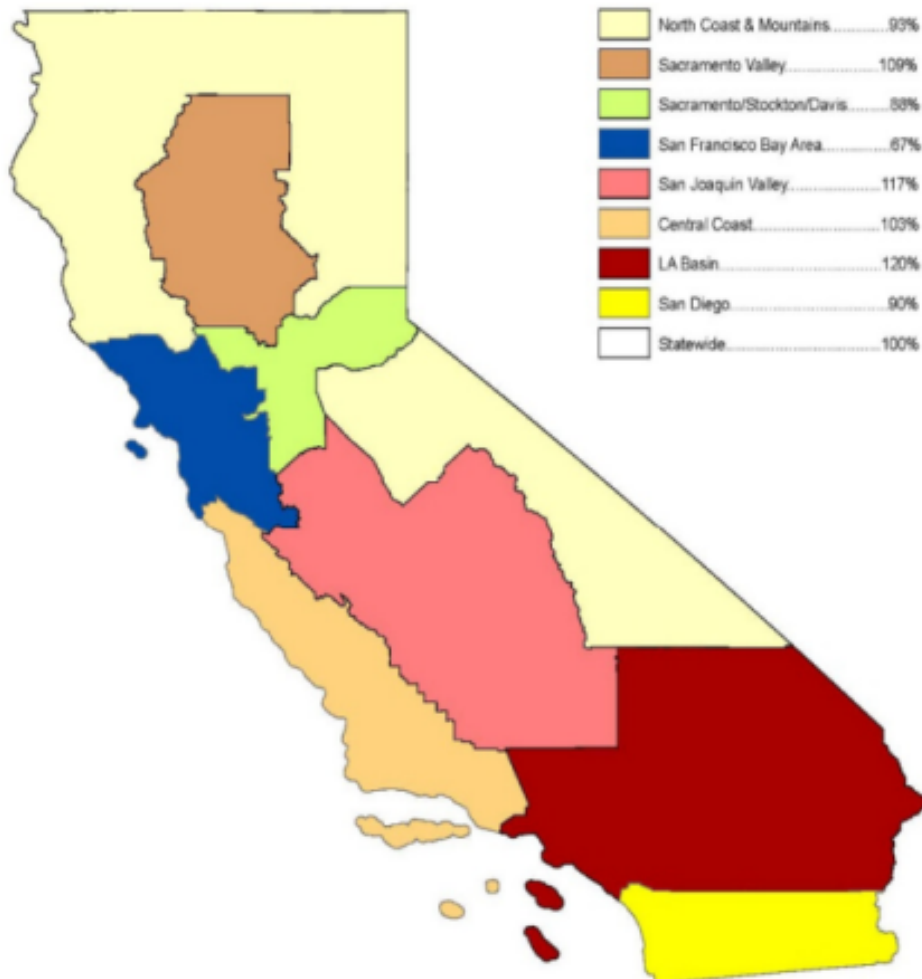
Current and Trending Workers' Compensation Rates

- For 2016, California Insurance Commissioner Dave Jones approved workers' compensation rates 2% **below** the average approved in July, which was below prior filings and recommendations dating back to 2015:
 - Medical losses continue to develop favorably
 - Recent severity growth continues to emerge below projections
 - Increase in projected wage growth due to economic expansion

- **The filing cautions, however, about:**
 - Increasing loss adjustment expenses
 - High indemnity frequency rates
 - Increasing numbers of independent medical review requests
 - Spikes in lien filings
 - Persistent increases in temporary disability duration requiring continued monitoring

Indemnity Frequency Compared to Norms

Chart 15: Indemnity Claim Frequency by Region
Actual to Expected Indemnity Claim Frequency
Adjusted for Regional Wage Differentials and Industrial Mix



North Coast & Mountains	93%
Sacramento Valley	109%
Sacramento/Stockton/Davis	88%
San Francisco Bay Area	67%
San Joaquin Valley	117%
Central Coast	103%
LA Basin	120%
San Diego	90%
Statewide	100%

Coordination vs. Segregation

- **You Cannot Safely and Effectively Meet All of Your Obligations in Compartmentalized Units**
 - ▣ Risk Management vs. Human Resources vs. Employee Benefits
 - ▣ “Return to Work” vs. Disability Management vs. Benefits Administration
- **Yet, The Standards Are Different, and Information Cannot be Freely Exchanged without Potentially Violating Privacy Laws**
 - ▣ W/C Gets Broader Access to Information (Because You are Challenging Liability or Apportionment)
 - ▣ Disability Management **Only** Gets Information/Can Consider Information Relating to the Disability for Which Accommodation is Sought
 - ▣ Benefits Only Gets (and Keeps) Information Relating to the Request and/or Administration of Benefits



Trying to Keep Up On New Regulations

- Protection for “Assistive Animals” in the workplace – “Comfort” or “Emotional Support” Dogs or Other Animals
- Clarified (?) Accommodation Obligations
 - “Affirmative Duty” to Commence the Interactive Process upon request by applicant/employee, there is an “observed” disability, or a third party reports a disability
 - Affirmative Duty Employers have an “affirmative duty” to make reasonable accommodations for a known disability, of any employee or applicant, unless the employer can demonstrate, after engaging in the interactive process, that doing so would pose an undue hardship. Employers must consider all possible accommodations, except ones that create an undue hardship. They must consider the preference of the applicant or employee to be accommodated, but have the right to select and implement an effective, alternate accommodation.
 - Disability – greatly expanded examples, now also including “learning disabilities” and “perceived potential disabilities”



Leaves of Absence



- CFRA vs. FMLA
 - ▣ No “Diagnosis” and No Right to Seek Updated Medical Certification Until Prior Certification Expires
- Timely and Complete Designations of Leaves
- Monitoring Leaves/Ability to Return
- Managing Workplace Absences
 - ▣ Part-Time/Overtime/Temporary Replacement (\$\$\$)
 - ▣ Impact on Other Workers
 - ▣ Return to Work (Which is Where we Now Take You)

So for about 75 More Minutes...

We're Going to Try and Provide Some Practical Examples and Tips to Help Keep you Out of Trouble By:

- Helping You Identify Some of the Current **“Traps”** and **Concerns** – Particularly in **Overlapping** Situations – W/C – ADA – FMLA/CFRA - Benefits
- Helping you Manage **Conflicting Goals and Standards** for Internal H.R./Risk Mgt./Legal and External Claims Management Personnel
- Providing you with **Tips** for Successful Integrating Workers Back into the Workplace (safely/timely/properly) ... **or**, Keeping them Out of the Workplace (safely/timely/properly)

Example 1 – PRIVACY



- Employee asserts a workers' compensation claim for an injured back, managed by Risk Management and an external TPA
- Human Relations is managing the return to work/interactive process, which is solely related to the back injury
- Human Relations (properly) is also approving LOA through FMLA/CFRA
- In managing the W/C, the TPA learns of prior back injury and knee injury claim
- Human Relations learns during the interactive process of a newly diagnosed diabetic condition that may impact the ability to return to work or perform the same job functions.

PRIVACY – SLIDING DOORS ANALYSIS

From the Workers' Comp. Side

- **Broader informational sharing on non-current injury to avoid payment obligations**
- **Deposition – discovery of prior claims and medical conditions including information that applicant may have been working in a “self modified” position**
- **LC 3762. TPA/Risk Manager is prohibited from sharing “medical information” to an employer except for (i) diagnosis and (ii) medical information to modify work duties for the W/C injuries.**

From the Civil/HR Side

- **ADA/FEHA Inquiries/Evaluations Only for Disability for Which Accommodation is Sought**
- **Disability Accommodation/ LOA File Separate from W/C File**
- **No Authorization for Sharing**
 - LOA (Can't get Diagnosis)
 - Knowledge Use of Other Information Invades Privacy and/or Violates Disability Laws

PRIVACY – RISK MANAGEMENT ANALYSIS

What Does Anthony Do?



- Work closely with Human Relations and advise them of information that is necessary for use during accommodation meetings/discussions, and which can be released legally.
- If medical information discussed during the accommodation meetings could be deemed confidential (non-industrial conditions) then have the employee sign a release of information allowing for greater sharing among District Personnel.
- Do not solicit/seek to prevent receipt of information regarding non-industrial issues relating to W/C claim.

Example 2 – SOCIAL MEDIA & E-MAILS

- PE Teacher injured her back breaking up a fight between two students – initial injury seemed genuine
- Months later, physician is still issuing work restrictions, and employee seems more capable than the restrictions suggest
- Fellow employee says that a common friend (not an employee) says the injured employee's Facebook page shows her digging holes and planting trees in her yard
- The fellow employee also says the injured employee was issuing emails from the school's computer system to her attorneys



SOCIAL MEDIA & E-MAILS

Alignment of Interests

□ E-MAILS:

- *Holmes v. Petrovich/Work Systems and Work E-mails*
- Airwatch (professional, not personal)
- Personal E-mail – No Passwords or Invasions
- Internet History/Traces
- Downloads to Computer

□ SOCIAL MEDIA:

- Personal information on publicly accessible social media sites is useable
- Co-workers and others may voluntarily (without coercion) disclose the contents of their “Friends” posts
- Social media can be used when discussing limitations, capabilities, or discipline/termination

SOCIAL MEDIA AND E-MAILS – RISK MANAGEMENT ANALYSIS

What Does Anthony Do?



- Report information received from fellow employee and suspicions to TPA and determine whether subrosa is warranted, as well as possible W/C “fraud” considerations.
- Prior to taking disciplinary action against the employee based on information gathered on social media, discuss with W/C and employment counsel on the impact of the information and consequences (Labor Code 132a, Civil Privacy, and/or ???).
- Remember, the “interactive process” must be continued until a determination is made Even if you believe the employee might not be “honest.” Don’t put your agency at risk by “stopping” that process prematurely.

Example 3 – PRE-STRUCTURED RETURN TO WORK PROGRAMS

- Agency has Created and Imposed a “Pre-Structured” Return to Work Program, which two of its Unions have not “objected” to during Negotiations
- Mechanic in the Transportation Department hurts his back, leading to lifting and kneeling restrictions.
- “Pre-Structured” would have the Employee return work on alternate duty picking up trash
- Employee objects, stating it is “beneath him,” and maintaining the “stooping” would harm his back



RETURN TO WORK PROGRAMS

PRE-STRUCTURED RETURN TO WORK – SLIDING DOORS ANALYSIS

From the Workers' Comp. Side

- **Easy Button –**
“If this, then that”
- **Saves money on W/C exposures**
(Reduced TD)
- **Helps ensure Risk**
Manager/Supervisor buy in if
they Helped “Build” the Program
- **Primary focus of workers’**
compensation initially is
determination of impairment –
these days work restrictions
seem to take a back seat

From the Civil Side

- **Anything “Pre- ...” May**
Violate ADA/FEHA Due to
“Individualized Evaluations”
- **One Size May Not/Does Not**
Fit All
- **Supervisors/Managers May**
not be Fully Vested
- **Different Job Functions at**
Different Sites or Roles

PRE-STRUCTURED RETURN TO WORK – RISK MANAGEMENT ANALYSIS

What Does Anthony Do?



- Ensure that all communications comply with “interactive process” standards.
- Carefully note that the employee cannot choose his/her accommodations in a return to work program.
- Interact with employee and ensure understanding of alternate work and positive aspects of returning to workplace.
- Confirm (one way or the other) whether the “pre-structured” program must be modified to meet this particular employee’s physical capabilities and limitations.

Example 4 – FRAUDULENT WORKERS’ COMPENSATION CLAIM

- Employee alleges that she slipped and fell in a hallway; there were no witnesses; there was Coke found on the floor, with the employee having an empty Coke can with her.
- Before notifying the employer, Employee goes to her chiropractor, whom she has seen for the last 10 years, who makes a diagnosis of “soft tissue injury arising from industrial accident.” He puts her off work for 10 days.
- Co-worker is eating dinner three days later, and sees employee dancing and drinking.
- Employee sees Co-worker and tells her not to tell anyone, and she will “make it worth her while.”
- Employee tells Supervisor, saying “Don’t tell anyone; please, don’t tell anyone.” Risk Manager hears “rumors” of the disclosure.



FRAUDULENT W/C CLAIM – SLIDING DOORS ANALYSIS

From the Workers' Comp. Side

- If defendant has an articulable suspicion of fraud, an investigation can take place without threat of lawsuit.
- Take statements of co-workers and the applicants (if not yet represented).
- If in formal proceedings, consider depositions and sub-rosa, as well as Index ISO searches.
- Can Lead to Criminal Prosecution, with such prosecution having a chilling effect on others who might seek to file frivolous claims

From the Civil Side

- Secondary Interest, but Not Necessarily a Complete Defense
- Serious Concern - **Timing**
- May not Erase Technical Violations (particularly if involving different issues)
- But, any “factual finding” of dishonesty is helpful
- There is nothing that is “off the record” – Treating it that Way violates your “fiduciary duty” to the Employer

FRAUDULENT W/C – RISK MANAGEMENT ANALYSIS

What Does
Anthony
Do?



- Risk Manager (and/or Human Relations Manager) need to conduct a reasonable investigation to confirm facts vs. “rumor.”
- Upon “reasonable” confirmation, notify TPA (or counsel), and provide information so they can determine how best to proceed.
- If there is a later “interview” of the Co-Worker or Supervisor, ask to be involved in order to “support” the person interviewed (attempt to avoid “chilling” effect”).
- Work diligently to provide “objective” facts regarding claim (i.e., what was/was not seen at the alleged accident site); do not “color” the facts in an effort to work toward a particular result.

Example 5 – FELLOW-EMPLOYEE MISCONDUCT

- Employee on Return to Work is given extra breaks, a change in hours, and reduced work duties as part of initial “interactive process.”
- Supervisor is complaining (to management and to fellow employees) that she can’t get all work done due to the “preferential” work assignments; the supervisor has also been concerned that management does not believe she is meeting her job expectations.
- Fellow employee actually tells employee that “he’s tired of favoritism,” and accuses employee of being a “faker” and “lazy.”
- Employee complains about this “hostile work environment” to Human Resources.



FELLOW EMPLOYEE MISCONDUCT

Alignment of Interests

- **Supervisor's conduct may ultimately reach actionable "harassment"/hostile work environment**
- **Fellow employees and supervisors have a duty to prevent Hostile Work Environment**
- **Supervisor/employee subject to discipline if the conduct continues**
- **Failure to act on information may result in additional claims being added to the underlying workers' comp claim such as psyche/stress**
- **Supervisor may need position reinforcement (if appropriate) that accommodation will not reflect negatively on his/her evaluation**
- **Individual Co-Workers may need a separate discussion on disability accommodation obligations, and their personal exposures**
- **Can Negatively Impact Interactive Process/Work Accommodations (Impairment by Others)**

FELLOW EMPLOYEE MISCONDUCT – RISK MANAGEMENT ANALYSIS

What does
Anthony Do?



- ❑ Contact Human Relations and work cooperatively to address the actions/statements of the supervisor, co-worker, and employee (“team” effort)
- ❑ “Listen” to supervisor and/or co-worker – it may be their view has merit (“injured” employee feels he/she is “untouchable” – which is unacceptable)
- ❑ Consider whether “Training” is needed (agency-wide/department) on standards and expectations
- ❑ Ensure documentation of remedial and preventative efforts (confirming actions as “defense” to a claim of inaction/incomplete action)

Example 6 – DISCIPLINE/TERMINATION

- Employee is on a legitimate workers' compensation leave; prior to the industrial accident, however, the employee was marginal (at best).
- An agreed return to work program is implemented, but employee is making numerous, basic mistakes and is not showing a positive return to the workforce
- Employee is also showing up late/leaving early, and taking what appears to be numerous personal calls.
- Employee has used “foul”/inappropriate language to supervisors and others. Some of these behaviors are consistent with pre-injury conduct; some are new and different



DISCIPLINE/TERMINATION

Alignment of Interests

- **Follow established protocols to interview/investigate the allegations**
- **Very objective (“facts only”) documentation**
- **Labor Code Section 132a exposures**
- **“Bad Conduct” Still Grounds for Discipline or Termination**
- **FEHA Retaliation Exposures**
- **Potential for Cross-Over, “Disability-Related” Misconduct May Create Additional Accommodation obligations**
- **The “Automatic” Response is not Always the Best Response – But Early Intervention is Required**

DISCIPLINE/TERMINATION – RISK MANAGEMENT ANALYSIS

What Does
Anthony
Do?



- ❑ Document the behaviors of the employee and the conduct that is occurring.
- ❑ Keep discipline in separate “silo” from worker’s compensation and be specific regarding infractions.
- ❑ If conduct rises to level of discipline or termination, contact counsel before taking action that may lead to 132a/Civil Exposures.
- ❑ Do not avoid discipline/termination when appropriate – It may/will only get worse, and create bigger and more costly problems.

Example 7 – FITNESS FOR DUTY/RETURN TO WORK EVALUATIONS

- ❑ Kitchen Staff employee on Workers' Compensation LOA is cleared for partial return to work six months after back injury, although there remains a question as to potential future back surgery.
- ❑ Personal physician's limitations raise concern, but are not overtly inappropriate.
- ❑ Employee is in the workplace, but Supervisor is very concerned with Safety/Potential for new/more significant workers' compensation injury; in fact, the employee suffers aggravation injury and goes out for another two weeks – then gets another clearance.
- ❑ Release is issued again, but when the employee returns, the Supervisor again expresses concern



FITNESS FOR DUTY/RETURN TO WORK EVALUATION – SLIDING DOORS ANALYSIS

From the Workers' Comp. Side

- ❑ **Fitness for duty evaluations are routine in many professions (peace officers)**
- ❑ **A functional capacity evaluation can be focused on essential functions of the job**
- ❑ **Helpful where doctors provide various assessment regarding the employee's work restrictions and employer does not know which they have to accommodate**

From the Civil Side

- ❑ **New Limitations on Obtaining Updated Medical Confirmation**
- ❑ **“Second Opinion” – For Safety**
- ❑ **Never Done to Avoid W/C Claim/Aggravated Claim**

FITNESS FOR DUTY/RETURN TO WORK EVALUATION – RISK MANAGEMENT ANALYSIS

What Does Anthony Do?



- Carefully Review Personal/MPN Physician’s Release to Duty –
 - Does it make sense, particularly for “safety sensitive” situations?
 - Is the Medical Care Provider an “expert” in the subject area?
- Always look to “capabilities” and “limitations,” not to diagnosis or “disabilities.”
- Reasonable belief of threat to own safety or others’ safety allows for additional reviews (but, it needs to be objectively written and established).
- Employee’s subjective concerns about another employee’s safety risks is not grounds to take action.

PRACTICAL DO'S, DON'TS AND TIPS



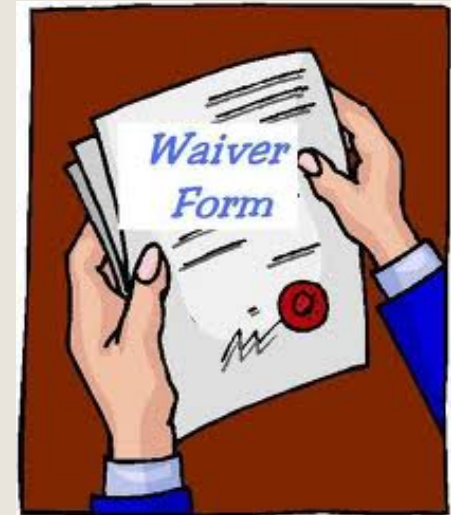
WHEN IN DOUBT...GET A “WAIVER”

- **If you cannot tell if you have a “right” to medical/private information, or to Investigate a particular Issue, request a waiver.**

- **Waiver must include:**
 - Type of information
 - Length of waiver
 - Right not to execute

- **Format**
 - **Forms are nice/safer**
 - **But e-mail can work (especially after a verbal conversation)**
 - **“This is to confirm”**
 - **“If this does not match with our agreement, please let me know immediately**

Purpose/Reason
Date/Name
Right to Revoke



RETURN TO WORK SAFELY

- **Fitness for Duty**
 - Job Description/Capabilities
 - Proper Doctor/Proper Release
 - Prescriptions/Emotional Limitations

- **Alternate Duty/Modified Duty that Works**
 - Structured programs must still be flexible
 - Match actual capabilities with actual duties

- **Interim vs. Permanent**
 - Looking for Interim Solutions in Most Cases
 - Some May be Permanent (if not negatively impacting Essential Functions/i.e., “permanent job restructuring”)



RETURN TO WORK IS A GOOD THING...REALLY!!

- **It is not proper/legal to treat similar industrial and non-industrial injuries/return to work situations differently (the “cause” does not matter in meeting LOA/Disability Accommodation obligations)**

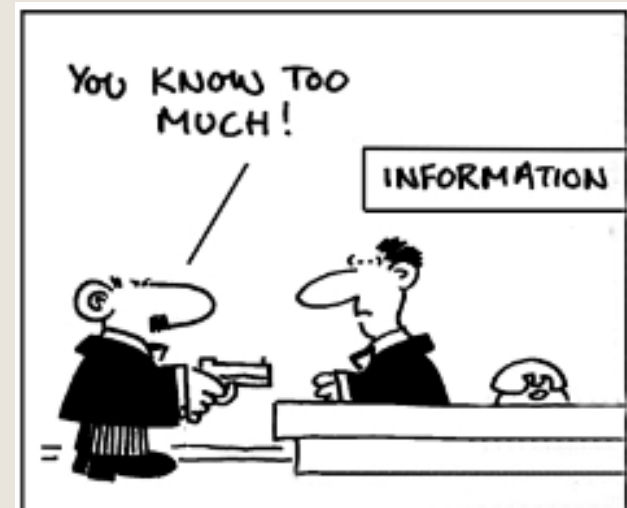
- **It is not proper/legal to deny return to work based on fear of workers' compensation exposure - an email/file note mentioning this concern would create a presumption of disability discrimination**

- **A Full/Complete Return to Duty Release is Not Required**
 - Violates legal obligations
 - Can meet important business needs
 - Change the mindset of illness



IF YOU GET TOO MUCH INFORMATION...

- ❑ **Document what you Did Not consider**
- ❑ **Return it (if you can)**
- ❑ **Try to keep it from happening in the future**
 - ❑ Avoid trail of continuing violations
 - ❑ Educate the other party
- ❑ **Disclose to the impacted Party/Employee**



GET YOUR LEAVES STRAIGHT...ASAP

- **FMLA/CFRA (regardless of cause)**
 - Designate ASAP
 - Limited Right to Information – **Don't Stop Here!**
 - **Limited Right to Medical Confirmation Renewals**
 - **Use California Forms/Not Federal Forms!**

- **ADA/FEHA**
 - Broader Informational Rights (But no Required Forms)
 - Limited to the Basis for the Accommodation Request

- **Collective Bargaining Agreements**

- **Must be Equally Applied – No Favorites/No Discrimination**

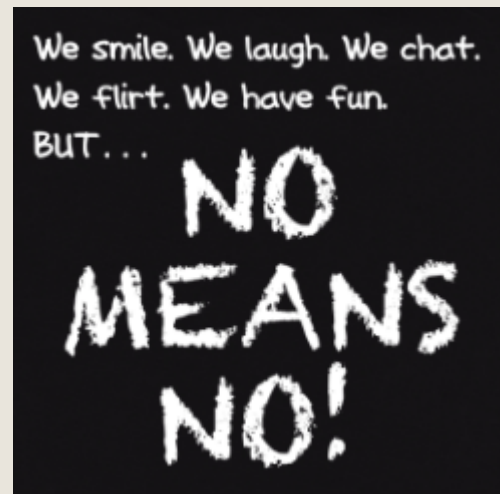
- **Get Your Paperwork in Order (and Documented What you Requested and When, Including Use of Your Forms)**



“NO” MEANS “NO” – “MAYBE” MEANS “NO”

An Employee May Not Want to Provide Information

- Explain the consequences of “no” and determine if the conduct/lack of cooperation can be changed
- **Not Every Rejection of a Information Can Result in an Adverse Determination**
- No, means “no” ... fairly impose consequences without violating privacy
- Qualifiers (“maybe” or “I’ll think about it”) is a no – until later changed in writing.



PUBLIC IS PUBLIC...PRIVATE IS PRIVATE... DON'T CROSS THE LINE

□ **Social Media**

- The vacation pics while on leave (yes)
- “Secret” friend requests, etc. (no)

□ **WCAB or Civil Suits**

- Filings (yes)
- Subpoenas (yes)
- “Off the record/Down the hall” (no)

(And that includes cross-communications between “Claims” and W/C and Risk Management)



JEALOUSLY PROTECT PRIVACY

- **Ensure that Laptops and Personal Cell Phones Containing Medical/Private Information**
 - Are Encrypted
 - Have Sufficient Passcodes/Security Measures
 - Are not Accessed by Family/Friends
 - Can Result in Serious Penalties and Exposures
 - Maybe Not HIPAA, but CIMA, etc.
- **Separated and Locked Files**
 - Electronically
 - Hard Copy





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