

## Is Anybody Working Anymore?

### Workplace Medical Conditions and Return to Work (?)

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## DISABLED NATION

### Social Security Disability Insurance

- 1970 - 1.5 million recipients
- 2023 - 9 million recipients
- Job protection/leave statutes (PFMLA, Sick and Safe Leave, Disability Laws)
- Growth of psychological/mental health disabilities
- Caselaw and legislation encouraging claims

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## Purpose of the Statutes

Workers' Compensation - WAGE PROTECTION  
MN Sick and Safe Law ["SST"] - Right to NOT SHOW UP FOR WORK  
Family and Medical Leave Act ["PFMLA"] - Right to be ABSENT FROM WORK  
Americans with Disabilities Act ["ADA"] - Right to be AT WORK if qualified  
Occupational Safety and Health Act - Right to a SAFE WORKPLACE

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## Workers' Compensation



- Applies to Most Workplace Physical or Psychological Injuries
- Pays for Most Lost Wages, as well as Medical Benefits, Permanent Disability, Rehabilitation Benefits and Retraining
- Employers Must Report all Potential Work Injuries to the relevant state agency
- Employees on Workers' Compensation may be Offered Light-Duty

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## Paid Family and Medical Leave Act

- Now covers virtually *all* employees (**268B.01 Subd. 15**)
- Entitled to 12 weeks leave for each *category* of leave, plus 8 additional weeks for the remaining category
- Leave may be taken "Intermittently"
- PFMLA Rights Are Absolute - do it wrong, and there often are no defenses (based on our evaluation of comparable federal law)



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## Recognize Possible PFML Situations - the obvious:

Cancer	Depression
Stroke	Nervous disorder
Diabetes	Coma
Epilepsy	Injuries from accident
Heart attack	Pregnancy
Migraine headaches	Asthma
Back problems	Alzheimer's
Pneumonia	Kidney problems
	Stress

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### Recognize Possible FML Situations – the “not so” obvious:

#### Substance abuse

Drive parent to dr.

Wife's sonogram

Physical therapy

Counseling

#### Military Exigency

- Rest and recoup
- Parent/Teacher mtg
- Send off ceremony
- Weekend trip to NY (short notice deploy)
- Meeting with lawyer

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#### Safety

?

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### Occupational Safety and Health Act



- Requires Employers to Create and Provide a Safe Workplace
- Provides Standards for Employers to Create a Safe Workplace (e.g., Ergonomic Standards for Work Stations)
- All Workplace Accidents must be Reported to the Department of Labor or State Deferral Agency

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### Minnesota Sick and Safe Leave

Generally overlaps with PFMLA, but for *short term* conditions

Paid for by employer, not through payroll taxes

1. Employees eligible if they work at least 80 hours/year *in* Minnesota
2. Employees are given 1 hour ESST for each 30 hours worked, up to a maximum of 48 hours/year
3. Employees may use ESST for: (a) illness (or preventive care); (b) family member's illness, treatment or preventive care; (c) absence due to domestic abuse, sexual assault, or stalking; (d) closure of workplace or school due to weather or public emergency.
4. Employers may front-load either 48 or 80 hours at the beginning of employment or the employment anniversary date.
5. Unused hours carry over, unless the employer allows front-loading of 80 hours/year.

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### Americans With Disabilities Act/MN Human Rights Act

- Protects persons with Physical or Mental Impairments that Limit Major Life Activities
- Only protects employees who are “Qualified” (i.e., can perform all the job's essential functions)
- Covered Employees may be Entitled to “Reasonable Accommodation” in order to allow them to become fully qualified for their jobs
- Once someone has Disclosed a Potential Disability (and not before!), Employers have an Obligation to find out if a Reasonable Accommodation Exists

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### ADA: Who is Protected?

#### Qualified Individuals With Disabilities:

A disabled individual who can perform the “essential functions” of his/her job with or without “reasonable accommodation”



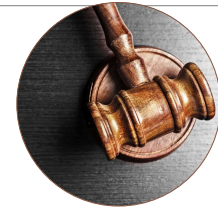
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## ADA: Definitions – Disability

- A physical or mental impairment that substantially limits one or more major life activities
- Record of having such an impairment
- Being “regarded as” having such an impairment

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## ADA Amendments Act (ADAAA)



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## Reasons for ADAAA (2008)

- Congress felt Courts were construing definition of “disability” too narrowly
  - The Supreme Court’s decisions in *Sutton v. United Airlines* and in *Toyota Motor Mfg. v. Williams*
  - The EEOC’s regulation defining “substantially limits” as “significantly restricted” was too high a standard
1. Expanded the definition of “major life activities”
  2. “Substantially limits” redefined and broadened
  3. “Mitigating measures” not considered
  4. List of Impairments that will “virtually always” be disabilities
  5. Term “disability” to be interpreted broadly, no need for extensive analysis
  6. “Regarded as” broadened

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## ADA: Major Life Activities



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## ADAAA ADDITIONS

Additions (in bold), include:

- Caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others**, and working.

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## Impairments That Will “Virtually Always” Be Disabilities

- |   |                                       |
|---|---------------------------------------|
| • Deafness  | HIV                                   |
| • Blindness   | Multiple Sclerosis                    |
| • Intellectual Disability                                       | Muscular Dystrophy                    |
| • Partially or Completely Missing Limbs or Mobility Impairments | Major Depressive Disorder             |
| • Autism  | Bipolar Disorder                      |
| • Cancer  | Post-traumatic Stress Disorder (PTSD) |
| • Cerebral Palsy  | Obsessive Compulsive Disorder         |
| • Epilepsy  | Schizophrenia                         |
| • Diabetes  |                                       |

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## Rule No. 1

A Workplace Medical Condition Will Involve EACH of These Statutes

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## Rule No. 2

Analyze Each Condition in the Order Presented

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### Analyze Each Injury in the Following Order:

- OSHA (File the Correct Forms)
- Workers' Compensation (Ditto)
- Sick and Safe Leave (Easiest, most immediate)
- FMLA (Toughest to defend against)
- ADA/Disability Discrimination
- LTD/STD Issues
- COBRA (Any Time Employee is Gone)

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### Complying With the Law – Practical Application

- We all want to be supportive
- A good business model helps all employees be successful
- HR advocates for employees

#### But...

- Handling medically-related issues can be extremely complicated and lead to cynicism and corner-cutting
- Challenge: Comply with the law while protecting employee AND employer rights
- Sometimes the process can be flat-out ridiculous

Let's look at an example...

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### Hypothetical Situation... Meet Bob B. Counter



- Due to a pressing need for a Bookkeeper, you hired "Bob"
- Bob's qualifications are a bit substandard
- Bob is somewhat "quirky"
- Performance issues
- Personality issues

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### Bob's Got Issues

- But, it doesn't stop there...
- He's not just "eccentric"...
  - He exhibits anti-social traits
    - Talks to himself
    - Talks to the water cooler
  - Bad personal hygiene
  - Misses a good deal of work
  - Doesn't like you much



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## You've got a Dilemma...



- You're a Good Person
- You Want to Do the Right Thing
- Bob Obviously Needs Help
- What Should You Do?
- Ask Him if Something's Wrong!

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# NO

If Bob says "yes" ...  
Then you've taken on obligations you didn't have before

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## Rule No. 3

Ignorance is Bliss

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## Q: What Do We Do With Bob?

Nothing... Except Treat Him Like Anybody Else  
Provide Counseling and Possibly Discipline

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## Let's Change the Hypothetical . . .

We're Not Going to Go too Far out  
of our way to help Bob . . .

We're Going to Take "Appropriate  
Administrative Action" with Regard  
to Bob's Employment Status

... We're going to can him ...

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## Q: What's the First Thing Every Manager Would Do?

- Fire First? Then Contact HR?

# No!

How about... Check with the company's Policies and  
Employment Records to  
Make Sure that You're Okay to  
Proceed with a Termination?!

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## BigCo Employee Handbook

### Article XVI – Discharge & Discipline

We reserve the right to impose appropriate discipline depending on the circumstances, up to and including discharge. The circumstances we will consider include the severity of misconduct, past performance, and whether the employee has been warned in the past concerning his or her conduct.

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## Employee Performance Feedback

Employee: Bob B. Counter

Supervisor: Ida S. Pizreviews

Rating: Above Average

Comments:

*Bob is a good performer. I wish I had a 100 more like him! We bowl together on Thursdays*

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### Rule No. 4:

Please, PLEASE, PLEASE Be HONEST With Performance Reviews  
(even though sometimes it's no fun)

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### Q: What if You Don't Have Good Documentation?

- AKA: What to do when you haven't followed Rule No. 4

- "Paper the file"



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OK...

- Let's Assume You Followed the Rules and Got Appropriate Documentation
- You've Followed the Progressive Discipline Policy
- You've Worked with Management/Ops, and They've Signed off on your Plans
- You Go Through the Right Channels and Set Up a Meeting with Bob
- And...

A+

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## MEMO

*Bob is experiencing extreme psychological injury due to the unfair and predatory treatment by his supervisor. The stress has aggravated his ulcer. He will need in-patient psychotherapy for 6 weeks, or until his insurance money runs out. In addition, he has a substantial exacerbation of a pre-existing borderline personality syndrome, overlaid with explosive personality disorder, and Chronic ADD. Patient is disoriented times three, and cannot return to work at his normal job unless and until the main stressor in his life, his supervisor is removed from the workplace. The patient will need twelve weeks off of work, combined with intense psychotherapy. After that, he may return to work on an as-tolerated basis, so long as he does not have to work with his former supervisor. I am now discharging this patient, as there is nothing else I can do for him at the moment*

- Dr. Phil McGraw, Ph.D.

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## Q: What Do You Do?

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- Put the gun down, cowboy...
- Self-identified as:
  1. Having a serious health condition
  2. Having workers' comp issues
  3. Being possibly disabled
- Cat's "Out of the Bag" About the Medical Condition

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## Since the Condition Was Disclosed....

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You are hereby released from Rule No. 3...

Now we've got to get all the information, and do it thoroughly

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## OSHA/Workers' Compensation Injury?

### What He's Got

- Stress
- Ulcer
- Explosive Personality Disorder
- Borderline Personality
- Attention Deficit Disorder

### What He Wants

12 Weeks Off  
 Psychological Treatment  
 Medical Treatment  
 Modified Duty Job  
 Wage Loss Benefits  
 Medical Benefits

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## You've Got to File This as a Workers' Compensation Claim

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- It's probably not an OSHA issue



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## Rights Under the PFMLA

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- Bob's Entitled to 12 Weeks Off of Work, either all at once or "intermittently"
- Also entitled to Same or Substantially Similar Position upon return

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Q: Do You Have to Give Bob FMLA?

YES!

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## Rule No. 5

FMLA Rights are ABSOLUTE  
(And, no, COMMON SENSE Doesn't Enter into It)

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Bob has a right to 12  
weeks of leave if his  
doctor says so

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## 12 Weeks Are Up... Back to Work!

BUT!

- Bob has "self-identified" as potentially disabled
- We need to address the medical condition

ADA Disability Criteria
Physical or mental impairment that substantially limits 1+ major life activities
A record of such impairment
Being regarded as having such an impairment

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Q: Does Bob Have a Legal Disability?

We Have NO Idea at This Point

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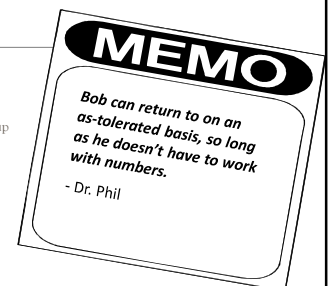
## Rule No. 6

KNOW WHAT YOU'RE TALKING ABOUT

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## Q: What Happens Next?

- Second note says return to work with restrictions
- Bob says he needs a few more weeks off to really heal up
- You could assign Bob to a modified duty position
  - Is there an obligation to create a light duty position?
  - Can we insist that Bob accept light duty?
  - How can we use light-duty?



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## BigCo Accommodation Policy

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[I]t is the intent of the Company to enhance the health and well-being of our disabled employees by providing reasonable accommodation to them to assist them in returning to work, whether they have become disabled by illness or injury...

The Company will reasonably accommodate a qualified person's disability as long as it does not cause undue hardship to the Company. Should our Company not have any jobs, with or without modification, that can be done by you with your skills, experience, and disability, we may be able to provide assistance to you in securing employment with another employer...

Light duty positions will be provided to those employees with work restrictions resulting from a workers' compensation injury, or from a legal disability, as determined by management....

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**Obvious Question: Since He Only Gets Light Duty if He Has a Legal Disability, IS HE DISABLED?**

Well, Let's See...

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## Interactive Process

- Employer & employee enter into a dialogue to explore accommodation options
- Goal: Determine job-related limitations, identify possible accommodations, assess effectiveness



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## Rule No. 7

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During the Interactive Process, You CAN & SHOULD Obtain Medical Information

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## Q: Is Bob a "Qualified" Disabled Person?

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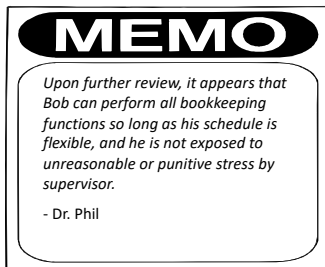
### Essential Functions for Bookkeeper:

1. Needs to be able to count
2. Needs accuracy
3. Needs to show up for work
4. Needs to work with his/her boss (you)

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*Bob, we're not sure we can accommodate these rather extreme work restrictions, so...*

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**Q: Is it a “reasonable accommodation” to allow Bob a flexible schedule and a stress-free environment?**

A: Maybe, but let's complete our medical investigation before making up our minds...

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### Independent Medical Report

*I reviewed the available medical records, and conducted an independent medical examination on Bob B. Counter. He has no restrictions, has reached maximum medical improvement, and has suffered no permanent disability. I do not concur with Dr. Phil, and his show isn't very good either.*

- Freddie Backtwerk, M.D.

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*Bob, we are delighted that you have recovered. Please be at work at 7:30 a.m. on Monday, June 4, ready to perform all the essential functions of your job...*

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### And if He Doesn't...

- Can you say COBRA notice?
- I knew you could



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### Questions?

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