

OSHA Obligations and Workers Compensation in Illinois

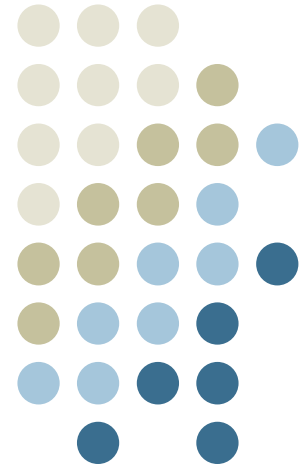
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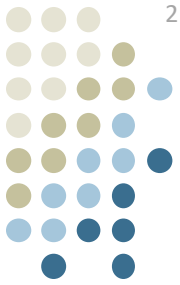
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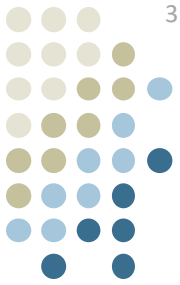


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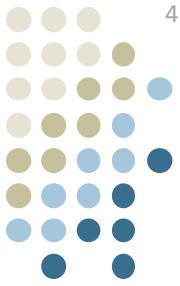
Avoiding Citations and Limiting Exposure



Pre-Incident and Inspection

- Work rules focused on safety
- Train employees on these work rules
- Act on violations of these work rules
 - OSHA is looking to prove that an employer knew of a violation or could have known about non-compliance if it exercised reasonable diligence
 - What your supervisors know is what you know
- Consistently enforce work rules and document action taken

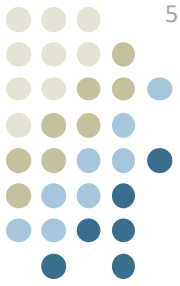




Pre-Incident Risk Analysis

- Job-Hazard Analysis:
 - A step-by-step method of risk identification related to a particular task
 - List all steps required to complete task
 - Review each step to determine what health and safety hazards are present
 - Determine measures to eliminate or lessen effects of those hazards





Pre-Incident Risk Analysis

- Outside review of health and safety program
- Look for various control measures
 - Engineering Controls
 - Machine guarding, guardrails, ventilation, and raw material substitution.
 - Work Practices
 - Modify jobs and tasks to reduce hazards
 - Administrative Controls
 - Job rotation and training
 - Personal Protective Equipment (PPE)
 - Clothing, eye or face protection, etc.

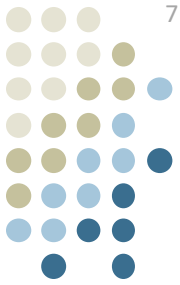




Contacting OSHA (“New” Rule)

- Reporting requirements:
 - If a fatality occurs within 30 days of a work-related incident, it must be reported to local OSHA office—can be phone or by internet. ***Fatalities must be reported within 8 hours.
 - Must also report any incident resulting in an amputation, loss of an eye, or the hospitalization of an employee within 24 hours of the incident. Employers must report the incident within 24 hours of learning about the event.

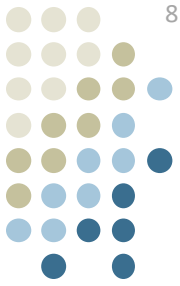




Generally

- OSHA still conducting a lot of inspections
 - Especially under “new reporting” rule
- OSHA still issuing a lot of citations
- Significant fines based on new fine schedule
- BUT fewer willful and repeat citations and fines are less punitive
- Willing to settle on more favorable terms
- More business friendly

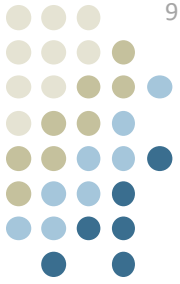




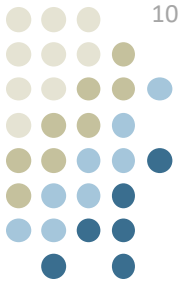
OSHA Focus for 2019

- National Emphasis Programs on:
 - Combustible Dust;
 - Lead;
 - Hex Chrome;
 - Metal Industry;
 - Trenching & Excavating;
 - Amputations (guarding, LOTO, etc.);
- OSHA can inspect any facility under NEPs, so don't need an injury, complaint, etc.





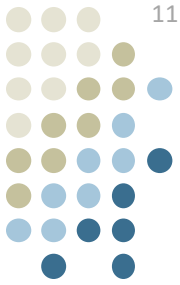
Managing the OSHA Inspection



Enforcement Crackdown

- In recent years, OSHA has stepped up enforcement efforts and increased penalties
 - Has not and will not change under Trump!
- Clear that OSHA leadership is strong proponent of worker protections, and is using penalties to generate revenue
- Construction industry is a target
- General industry with temporary workers targeted

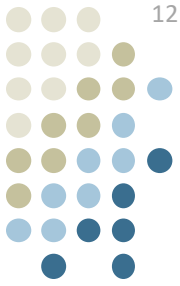




Employee Complaints

- OSHA encourages employees to report injuries, illnesses, and violations
 - now more than ever—especially via anonymous complaints on OSHA's website
- Employers should do the same
- Otherwise, employees may go directly OSHA
- It is also important to actually respond to and address complaints





Enforcement Crackdown

- The strategy:
 - Penalty increases and deterrence
 - Punish employers to set an example
 - Publicize citations and do not settle easily
 - Threshold for publication of violation formerly \$100,000. . . Now, it is \$45,000
 - Press releases are inflammatory
 - More “willful” and “serious” violations

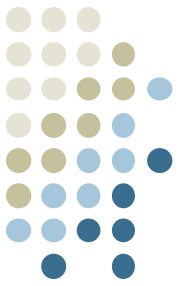




Before OSHA Arrives

- What is at stake:
 - Civil penalties
 - Abatement costs
 - Criminal penalties
 - Civil liability
 - Media attention (negative)
 - Employee relations issues (social media is a weird place!)

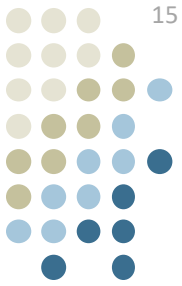
Types of Violations and Penalties (New Fines)



- Serious
 - Substantial probability of death or serious physical harm
 - Fines of up to \$12,600 for each violation
- Willful
 - Intentional act in knowing violation of OSHA Act or employer is aware of the hazard and makes no effort to eliminate it
 - Fine between \$5,000 and **\$126,000** for each violation
 - If death occurs, offense is punishable by imprisonment and fines up to \$500,000
- Repeat
 - Fines up to **\$126,000** for a substantially similar violation
- Failure to Abate
 - Failure to correct a prior violation
 - Fine up to \$12,600 for each day violation continues beyond abatement date
- Other than Serious
 - Violation with direct relationship to job safety, but not likely to cause harm or death.
 - Discretionary fine of up to \$12,600



Types of Violations and Penalties



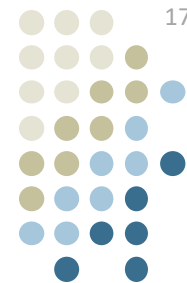
- Higher penalties:
 - Size of penalty:
 - Reduced 10-40% for employers with less than 250 employees
 - No reduction if over 250 employees
 - Repeat offenders:
 - Increased time frame for “repeats” from 3 years to 5 years
 - Increased penalties for “egregious” violations



Managing the OSHA Inspection



- The inspection may be inevitable, but a citation might not be
- Must manage the process as effectively as possible
- OSHA is there to get the facts, not help you
- Be informed of your rights and prepare your employees
- Use a balanced approach:
 - Be cordial but cautious, and always remember OSHA's objective
- Remain Professional

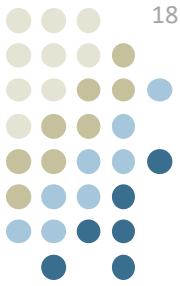


The Inspection Process

- Opening Conference
- The “Walk Around”
- Employee Interviews
- Document Requests
- Closing Conference
- Citations
- Informal Settlement Conference
- Contesting Citations



Consent and the OSHA Inspection



- Consent:
 - Employer has a right to request a warrant
 - Not always advisable to do so, but should be raised and required when justified
 - May increase future (plain view) inspections
 - Put you on OSHA's "radar"
 - Plain View Doctrine:
 - When worksite is visible from a public area, an OSHA officer has the right to photograph and observe from that location
 - Consent may be given by any management official, including a foreman or superintendent
 - Make sure employees are aware of this
 - Implied consent will be inferred if not objected to
 - On a multiple-employer site, consent comes from site "controller"
 - Usually owner, developer, or general contractor





The Opening Conference

- Conducted upon arrival by compliance officer
- Company representatives should absolutely attend
 - Do not allow the inspection to start until the appropriate people are onsite!
- Officer must give reason for inspection
 - Plain View, Accident, Complaint, Scheduled
 - If a Complaint, request a copy of it



The “Walk Around”

- NEVER allow an OSHA officer to walk the worksite unattended
- Company and union representatives have right to accompany the officer
- Take parallel videos, photos, samples and notes
 - Do not rely on or expect OSHA to share its evidence
 - You have a computer in your pocket—use it!



Employee Interviews

- Any “supervisory” employee may be interviewed
 - Any foreman, crew leader, lead man, or other employee considered “in charge”
 - Applies even if person is in a union
- Counsel may be present during interview
- Union or hourly employees may be interviewed privately or with steward or personal attorney
- What is said can become evidence for purposes of issuing citations
- **KNOW YOUR RIGHTS!**
 - Have the right not to be recorded or sign statements
 - Have the right to an attorney and/or an interpreter
- **TELL THE TRUTH!—Lying to OSHA is a CRIME!**
 - Can be charged with felony for obstructing a federal investigation





OSHA Document Requests

- Insist that requests be made to a single source and in writing
 - Makes for more efficient record keeping and prevents turnover of improper documents
- Considerations:
 - Is the document responsive to the request?
 - Do not give them something they have not asked for
 - Is the document relevant to the inspection?
 - If not, do not give it to them—can and should object!
- Always keep a copy
- Never allow unfettered access to documents

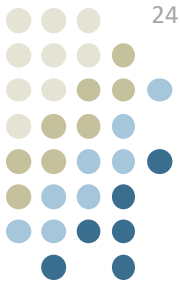




Closing Conference

- Obtain as much information from Inspection Officer as possible:
 - What citations will be recommended?
 - How will each be classified?
 - What abatement should be done?
 - How should abatement be accomplished?
 - Basis for each citation?
- Clarify any misunderstandings of fact
- **DO NOT:** 1) make admissions; 2) argue; 3) get angry; 4) insult the officer or OSHA; or 5) discuss the financial situation of your company.

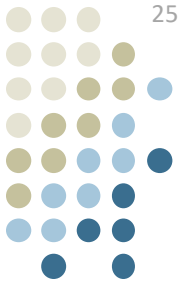




Issuance of Citations

- Citations arrive by way of certified mail and are tracked by OSHA
- Citations must be received within 6 months of inspection, or they are stale and can be easily defeated
- Citations will reference standard(s) violated, set out proposed penalties, and outline your rights
- Act on Citations IMMEDIATELY





How to Respond

- Pay the Citation in Full (not advised)
- Informal Conference with the Area Director
- Notice of Contest
- Formal Settlement
- Hearing

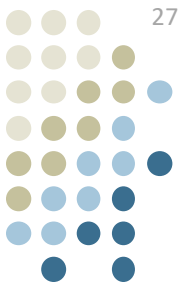




After the Citation

- Employer also has a right to an informal conference with an area OSHA director within the 15 day period
- Have 15 working days from receipt to file a notice of contest
 - Not extended under any circumstance
- Failure to file notice of contest precludes any challenge to any part of a citation

Post-Citation Informal Conference



- OSHA encourages conference and it should be pursued
- A potential means for resolution without litigation or other appeal
- Allows employer to gain understanding of exactly what OSHA expects
- Occasionally, settlement terms may be favorable to employer if citation remains as issued
 - Be creative with settlement terms: fines, additional training, etc.
- Can be “free” discovery and exchange of “evidence”





To Contest...Or Not To Contest

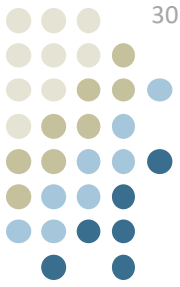
- Varies depending on circumstances
- Consider:
 - Nature of violation
 - Repeat? Willful?
 - Proposed penalties
 - Impact on future business
 - Cost to contest
 - Cost of abatement
 - If prohibitively costly and delays completion of work, may want to challenge
 - Whether employer believes citation is proper or not.





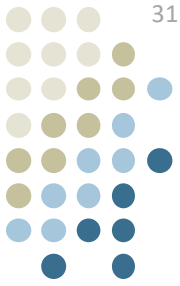
Notice of Contest

- Case goes to solicitor/attorney for DOL
- Sometimes settlement can be reached if settlement discussions with area director were close
- After the complaint and answer are filed, case goes to OSHRC (Review Commission)
- Majority of cases settle before going to hearing



Early Stages

- If you have any doubt regarding settlement and resolution, you should contest
- Settlement discussions continue, usually with the regional solicitor, not an area director
- This can resolve disputes early, without lengthy adjudication



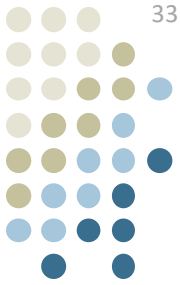
Citation Defenses



OSHA's Burden of Proof

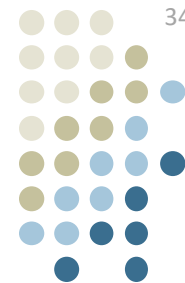
- OSHA has burden of proof for ALL of the following:
 - Standard applies to the cited condition
 - Standard was violated
 - An employee had access or exposure to the cited condition
 - The condition was capable of causing serious bodily harm
 - There is a feasible and effective abatement method and
 - The employer knew or should have known of the condition
 - Knowledge of anyone in “management” (foreman, superintendent, shift supervisor, etc.) is considered knowledge of the employer.





Citation Defenses

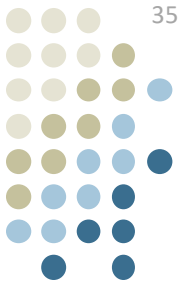
- Citation lacked reasonable particularity sufficient to allow corrective action
- Violation was not identified by employer, even in light of employer's reasonable diligence in monitoring the facility/safety
- Isolated incident
 - Usually related to malfunction or misconduct



Citation Defenses

- Impossibility/Infeasibility of compliance
- Non-compliance safer than compliance
- Improper inspection did not follow policies and procedures
- Multi-employer worksite defenses (primarily construction accidents). Employer was not the:
 - Creating
 - Exposing
 - Correcting, or
 - Controlling...EMPLOYER



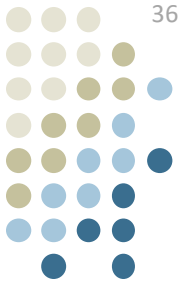


Employee Misconduct

Must establish the following:

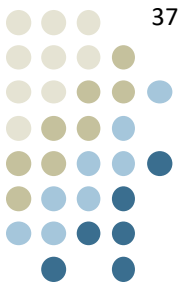
- Appropriate Safety Program;
- Training on Program;
- Program is Enforced (i.e. Inspections); and
- Disciplinary Action Taken When Program Violated.





New Rules...

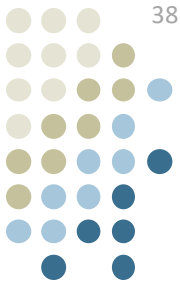
Recordkeeping—Electronic Reporting & Use of Data



- Employers with more than 20 employees in most industries are required to submit their OSHA 300A Forms electronically to OSHA
- Employers with more than 250 employees were initially required to submit their OSHA 300, 300A, and 301 Forms electronically to OSHA but OSHA rescinded this in 2019
- OSHA currently using data submitted for 2016 to compile a programmed inspection list and will be inspecting:
 - Employers who were supposed to submit 300A data and did not;
 - Employers with high rates of injury for their industry
 - If you fall into one of these categories, be prepared!



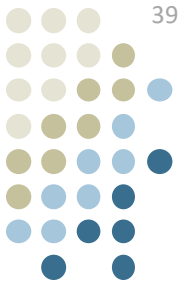
Injury and Illness EE Reporting Rule (NEW RULE)



- New rule requires employers to establish reasonable procedures for employees to report work-related injuries and illnesses.
- OSHA has indicated that citations will be issued when:
 - 1) the employer does not have such a procedure; or
 - 2) the procedure is unreasonable.



Injury and Illness EE Reporting Rule (NEW RULE)



OSHA has identified the following requirements as being unreasonable:

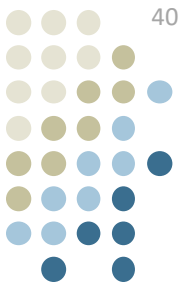
- 1) requiring employees to report injuries “immediately” or face discipline; and
- 2) requiring employees to report injuries in person.

OSHA suggests that a reasonable procedure is one that allows employees to:

- 1) report injuries “as soon as practicable,” which could include the same day or the next day; and
- 2) report injuries and illnesses by way of phone or email, in addition to in-person.

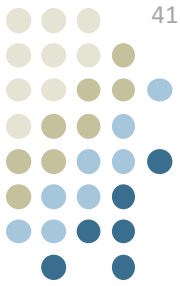


Injury and Illness EE Reporting Rule Guidance



- New rule prohibits employers from retaliating against employees in three separate ways: 1) discipline; 2) drug testing; and 3) safety incentive programs.
- **Discipline:** OSHA encourages employers to discipline employees when violate a safety rule, but employers cannot discipline employees more severely for the violation of a safety rule that results in an injury.
 - OSHA will look into how an employer handles discipline to determine whether it is being used to discourage employees from reporting injuries.
 - Employers should be consistent when disciplining employees—an employee that violates a safety rule and is injured should not be disciplined more severely than an employee that violates that same safety rule and is not injured.

Injury and Illness EE Reporting Rule Guidance



Initial Drug Testing Rule: If impairment could have played a role in the injury, then drug testing of all employees whose conduct may have caused or contributed to the incident can and should be conducted.

- If impairment could not have played a role in causing the injury, no testing!

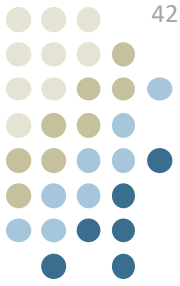
NEW GUIDANCE: drug testing is allowed in the following circumstances: 1) random testing; 2) drug testing unrelated to an injury; 3) testing pursuant to a state's workers compensation laws; 4) testing pursuant to federal law, including U.S. DOT rules; and 5) testing employees whose conduct could have caused or contributed to an incident or injury.

Initial Safety Incentive Program Rule: OSHA does not prohibit safety incentive programs as long the programs do not result in adverse action against employees for reporting injuries or illnesses.

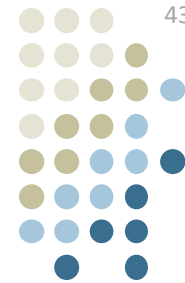
- Safety incentive programs should not be tied directly to injuries and illnesses.

NEW GUIDANCE: traditional incentive programs based on a lack of injuries during a particular time period will not be deemed violative of OSHA if the employer has measures in place to ensure that employees are reporting injuries regardless of the programs



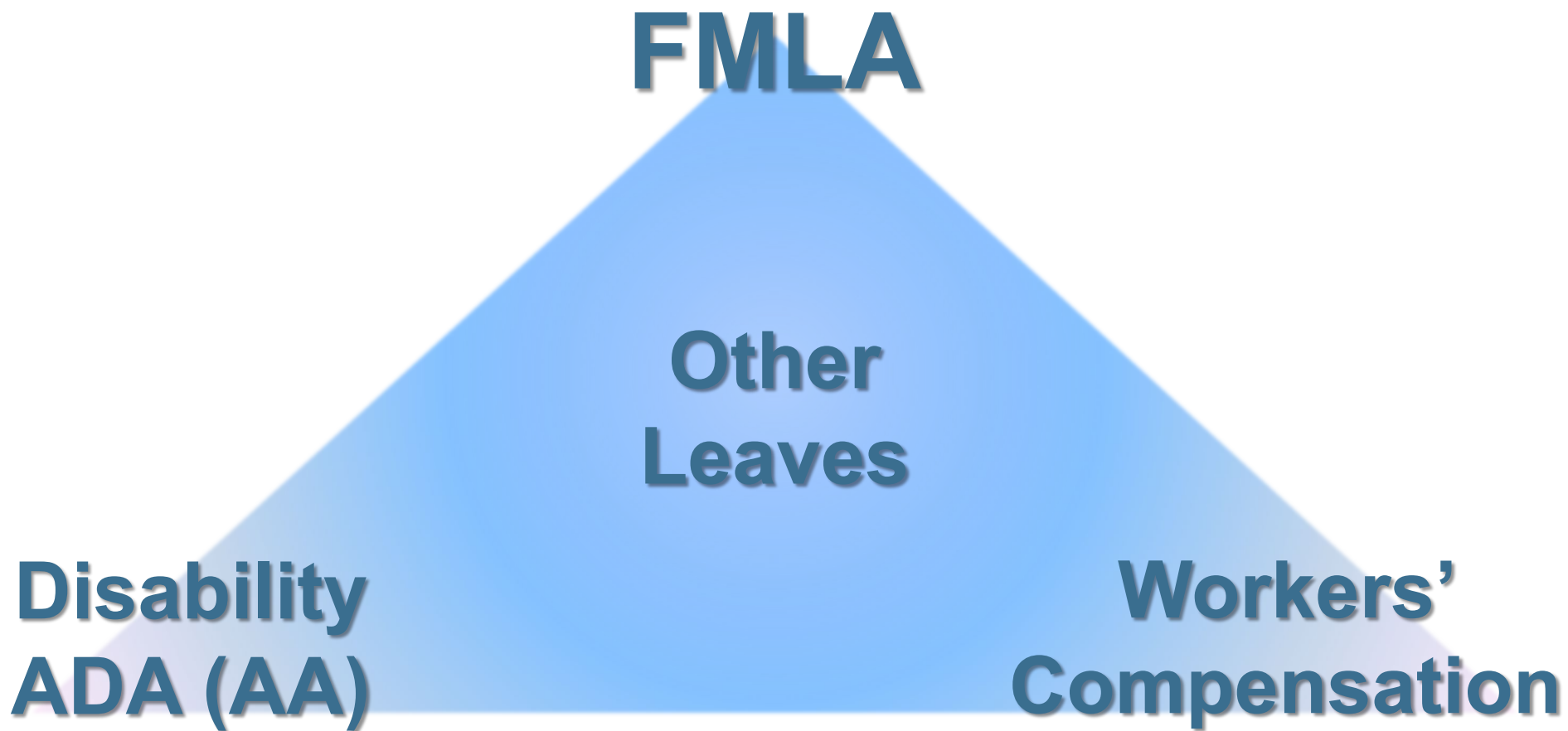


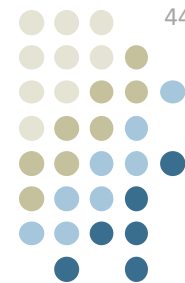
The Bermuda Triangle



INTRODUCTION

The Bermuda Triangle



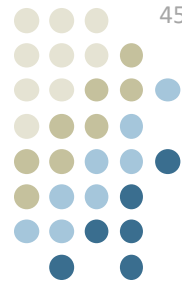


Managing The Bermuda Triangle of Employee Leaves of Absence:

1. POLICY LANGUAGE Properly Define Expectations as to Leave Rights & Benefits
2. UNDERSTAND when Each Type of Leave Applies
3. APPLICATION of the Correct Type of Leave(s)
4. CONSISTENT APPLICATION of Leave and Policies
5. PROPER DOCUMENTATION for Each Type of Leave
6. EXHAUSTION of ALL Available Leave Rights & Benefits
7. PRIVACY of Information and Documentation
8. CERTIFICATIONS, MEDICAL DOCUMENTATION
9. ESTABLISHING/EXHAUSTING AND DOCUMENTING THE INTERACTIVE PROCESS
10. GOOD FAITH ACCOMMODATION

***AND PROPERLY PROCESS THE WORK COMP CLAIM TIMELY

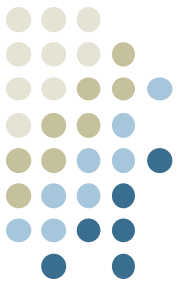




Questions or Comments?



Thank You!!



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