



Return to Work Roulette

An Entertaining Spin on CFRA, FMLA, FEHA, ADA and Workers' Compensation Leaves

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Presenter



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About Michael Sullivan & Associates

- **Specialized Expertise:** California trial attorneys dedicated to representing employers in employment law, civil defense, subrogation, and workers' compensation cases
- **Statewide Presence:** 10 offices spanning the entirety of California, ensuring local insights and representation.
- **Client-Centric Approach:** Customized defense strategies to safeguard your business, and reduce risks, complemented by our advice and compliance practices to prevent and counter litigation.



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Agenda

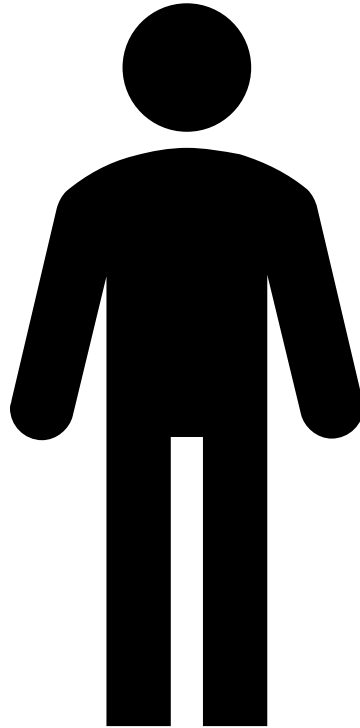


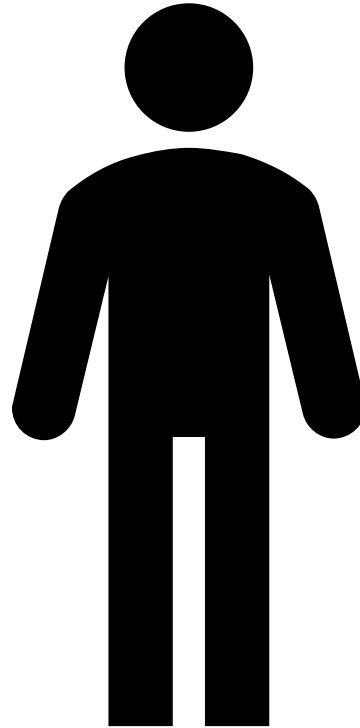
- Intricacies on the types of leaves:
- Workers' Comp, FMLA, CFRA, FEHA, ADA
- Raines Ruling
- Disability
- Interactive Process
- Leave & Accommodation Laws
- Return To Work Regulations

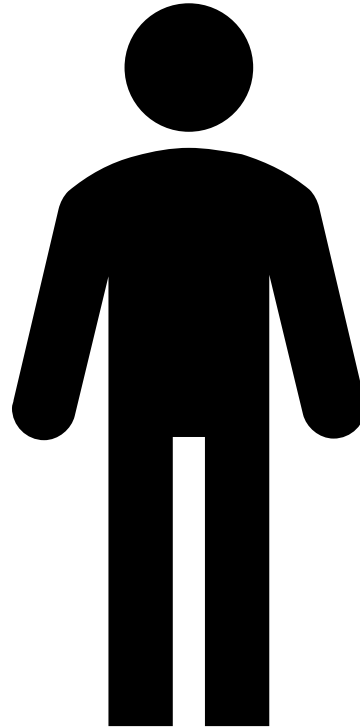
Workers' Compensation Claims & Impact on RTW/Leaves

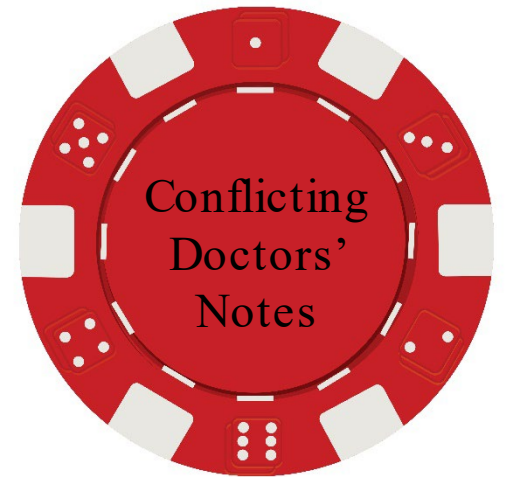
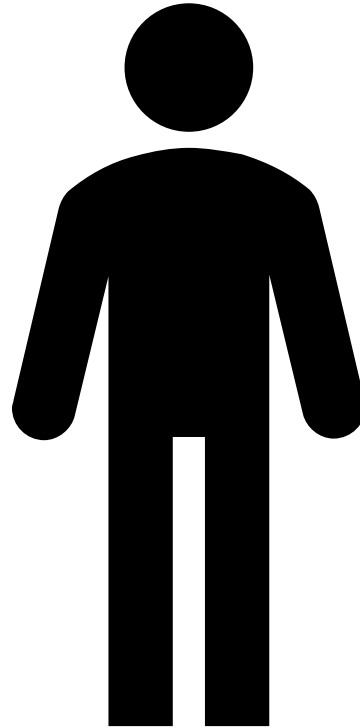
All Too Real Claim Example



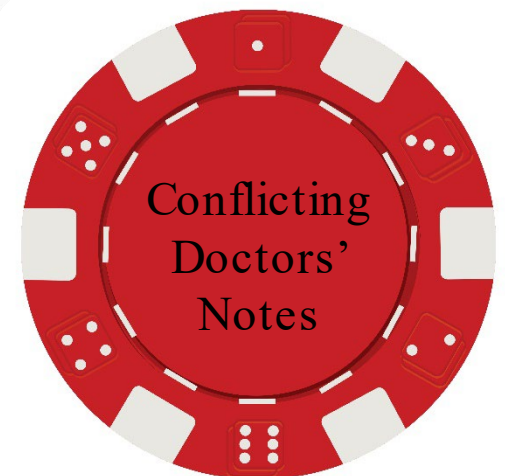








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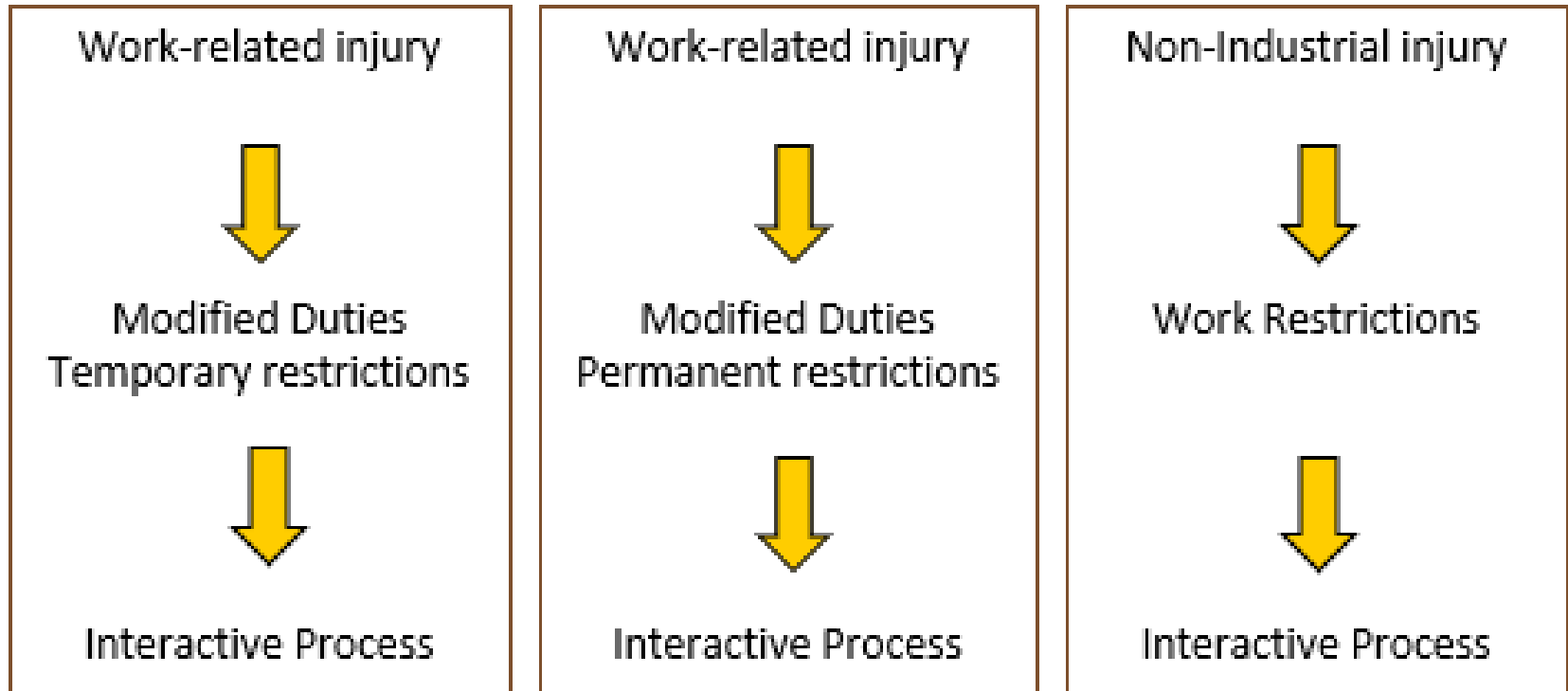


The Royal Flush . . .

- Consistent policies and procedures:
 - Is there alignment between procedures on industrial vs. non-industrial?
 - Is the process different if restrictions are temporary vs. permanent?
- What is your interactive process and how do you document?
 - Timeline is critical
 - Essential job functions updated



Return to Work



Outcome is the same regardless of the type of injury

EPL Alphabet Soup: ADA/FEHA/FMLA/CFRA

FEHA/ADA



- **FEHA** – applies to employers with 5 or more employees
- **ADA** – applies to employers with 15 or more employees
- Requires the reasonable accommodation of qualified employees with disabilities to enable them to perform the essential functions of their positions
- These laws are intended to be given the broadest possible meaning
- Applies to industrial and non-industrial injuries and disabilities

Who is Liable Under FEHA?



Raines v. HealthWorks

- Businesses that perform employment-related tasks for other companies, such as screening job applicants, can be held liable for discrimination under state law.
- The FEHA prohibits employers from making medical inquiries unless they are job-related and consistent with business necessity.
- The law defines "employer" to include "any person acting as an agent of an employer, directly or indirectly."

Disability, Defined.



- Definition of disability:
 - Physical disability
 - Physical condition or disorder that affects a major bodily system that limits a major life activity
 - Mental disability
 - Having any mental or psychological disorder or condition that limits a major life activity
- ***Limits*** means simply that the condition makes achievement of the major life activity ***difficult***.

THE ADA and the FEHA



- A defendant is liable for aiding and abetting if the person:
 1. Knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act, or
 2. Gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.
- *Casey v. U.S. Bank Nat'l Assoc.*, (2005) 127 Cal.App.4th 1138, 1144
 - see also Gov't Code § 12940(i)

THE ADA and the FEHA

- Aiding and abetting cannot be imposed on a party who is the alleged discriminator, retaliator, etc.
- *Naverette v. Mayer* (2015) 237 Cal.App.4th 1276 (aider and abettor liability imposes liability on a person who did not personally cause the harm to plaintiff).
- Mere knowledge and the failure to prevent it do not constitute aiding and abetting.



Essential Job Functions



Must accommodate a disabled employee to effectively enable one to perform their “essential” job functions of their position or the position they seek

- What does “essential” mean?
 - The position exists to perform that function;
 - The extent the function can be performed by or distributed to others;
 - The function requires high level or skill or expertise;
 - Majority of time is spent performing that function;
 - Failure to perform the job function has legitimate business consequences.
- Evidence of an “essential” job function
 - Job descriptions – if accurate and up to date and reflect what the employee ACTUALLY does.
 - Performance reviews focus on essential functions in the job descriptions.

Interactive Process



- Is a critical employer obligation
- Is a separate, “stand alone” obligation and violation of the law

Triggers:

- Employer is made aware of need for accommodation by TPA, employee’s representative or by observation
- Employee specifically requests accommodation
- No magic words required
- Employee with a disability exhausts leave under WC/CFRA/FMLA and the employee’s healthcare provider indicates further leave is needed

Hypothetical . . .



- On a Monday, an employee who has been employed for eighteen months, but with a long pattern of well-documented performance issues, is told to come in early Tuesday for a meeting with Human Resources. Human Resources had been leaning toward terminating the employee but wanted to give him one last chance.
- He then no-call/no-shows for three days in a row and calls to his home to inquire about his well-being go unanswered.
- Friday morning, his girlfriend calls and reports that he is depressed and unable to return to work until Monday.
- On Monday, he presents a note that states he cannot endure stressful interactions, will require “additional breaks,” and will need to “periodically take off work for appointments.”
- When Human Resources attempts to discuss the situation with him, he becomes agitated and insists his doctor will not permit it, but his girlfriend can be available to discuss it.

FMLA/CFRA

Employers

- Employer must have 50/5 or more employees
- Within any state
- All Public Agencies regardless of number of employees

Employees

- Employee has 12 months of service; and
- Worked 1,250 hours in past 12 months; and
- Has a qualifying circumstance

Eligibility

- 12 weeks of leave in a 12-month period



CFRA vs. FMLA



Parameters of Comparison	FMLA	CFRA
Minimum of Employees Working	At least 50 members are apart of the organization.	At least 5 members are a part of the organization.
Area of Work	Employee working must be staying within 75 miles of area.	No such eligibility mentioned in the act.
Medical Diagnosis	Employers may be allowed to ask for a diagnosis in case of the fragile health of an employee.	Employee aren't asked for the diagnosis in case of the fragile health of the employee.
Reason of Application	In the case of pregnancy of an employee, leave is granted	In the case of pregnancy of an employee, leave is not granted.
Family Member	Child, parent, spouse	Child, parent, sibling, spouse, domestic partner, grandchild, grandparent, designated person

Employee Notice/Employer Designation

Employee Notice

- No “magic words” per se
- The employee must indicate FMLA-qualifying reason
- Verbal notice to make the employer aware of need
- Sufficient notice is “inquiry notice”
- Where practicable need to give 30 days notice

Employer Designation

- Employer may unilaterally designate if have reason to believe leave is FMLA related.
- Must give notice of the designation
- Require medical certification



Qualifying Circumstances Under FMLA/CFRA

- Birth or placement for adoption of a child
- Serious health condition of an immediate family member
- Military exigency (in active military duty or “called up”)
- Care for ill/injured service member (26 weeks of leave)

Employee’s own serious health condition

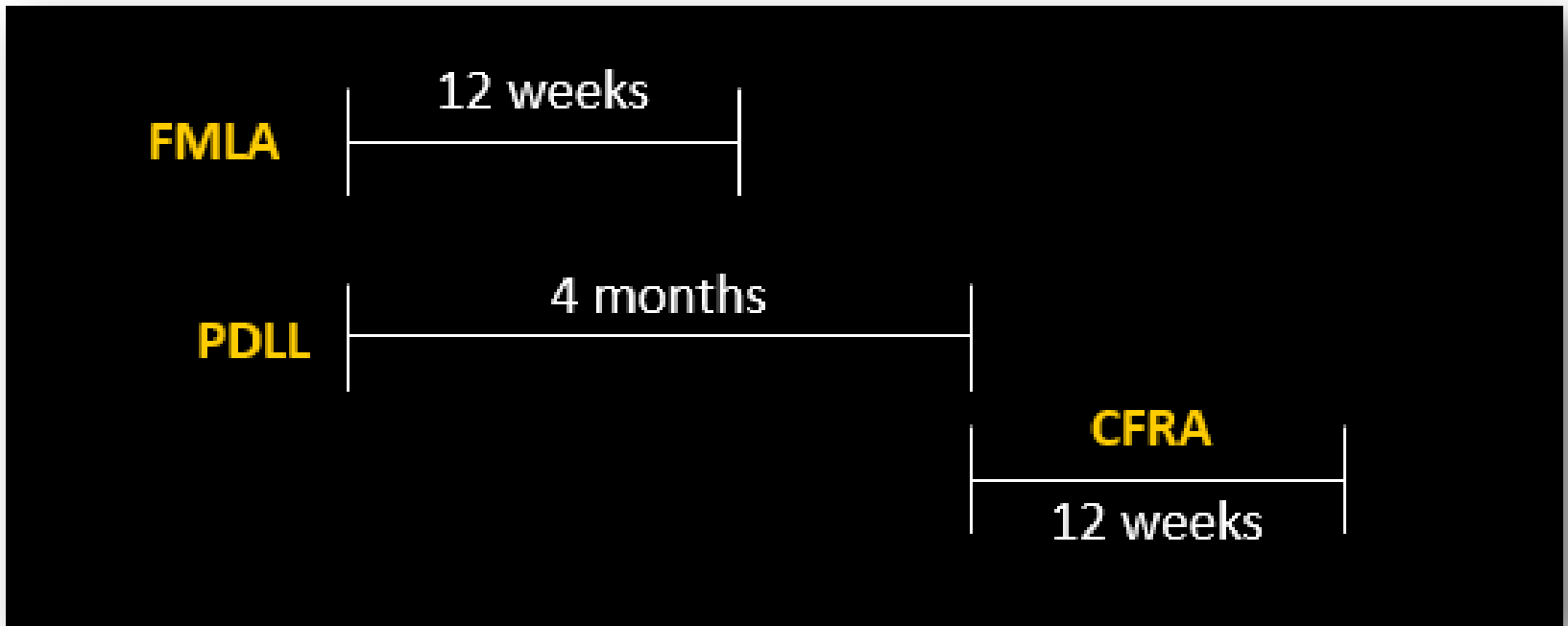
- Inpatient care
- Incapacity of more than three consecutive days
- Incapacity due to pregnancy
- Chronic serious health condition (e.g. asthma, diabetes, epilepsy)
- Permanent or long-term medical condition (e.g. cancer, kidney disease)
- Can include a WC injury

Interrelationship of Leave Laws



- Employers must evaluate their responsibilities under each of the potentially applicable leave laws independently.
- An employee with a work-related disability may enjoy overlapping coverage under several laws including ADA, Labor Code Section 132a, FEHA, FMLA and CFRA.
- Interplay of FMLA/CFRA/PDLL
 - Leaves that qualify under FMLA and PDLL run concurrently.
 - Leaves that qualify under CFRA and PDLL run consecutively.
 - In effect, a woman can use her FMLA and PDLL concurrently up to four months (less if actual disability is shorter than four months) without dipping into CFRA leave.
 - Potentially allows a woman to take four months of PDLL and an additional 12 weeks under CFRA for a qualifying event (e.g. to spend time with newborn child).

FMLA/CFRA/PDLL



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Q & A

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Thank You!

