

# Federal Labor Regulations Affecting Farm Employers



Presented by:

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# It's all hypothetical ...

- No admissions against interest, please.
  - You should consult with your own counsel for legal advice so you can speak candidly and obtain counsel that is attorney/client privileged.
  - What we'll cover here are summaries and “heads up” comments and are not a substitute for advice from a lawyer as counsel to your business.
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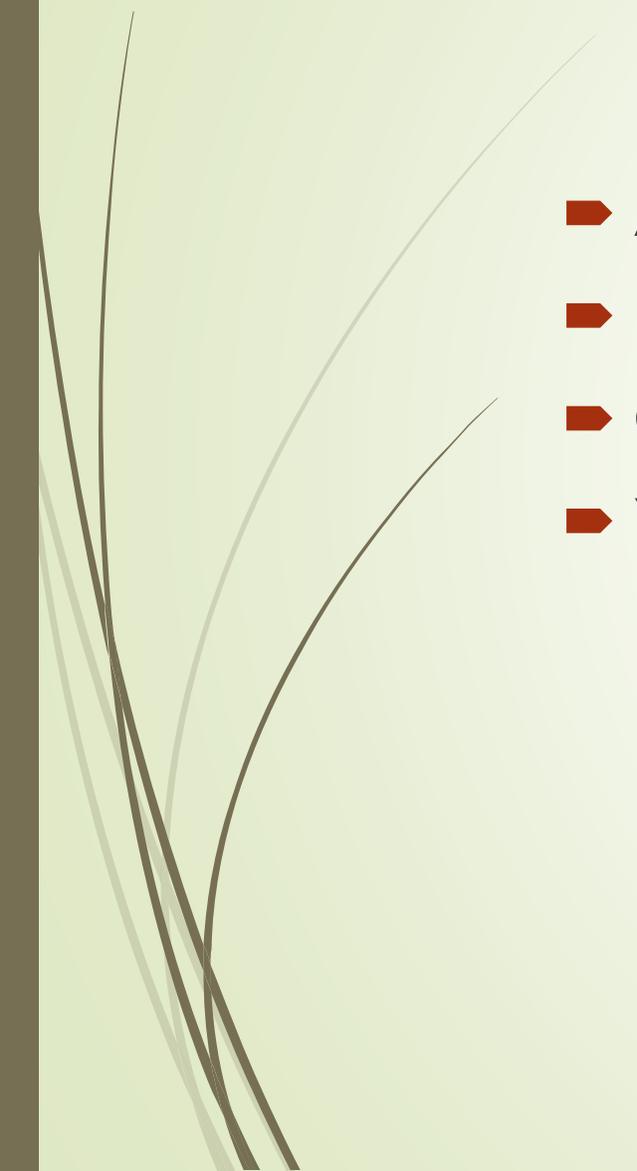


# You Need Contingency Plans For HR Issues

- ▶ Anticipate predictable HR issues
  - ▶ Plan your initial response
  - ▶ Educate the possible first responders
  - ▶ Identify your advisors/experts
  - ▶ Successfully resolve the issues
  - ▶ Minimize or avoid legal liability
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# Overview Of This Session

- ADA
  - FMLA
  - Civil Rights Laws – Harassment
  - Your questions and comments welcome
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# The Americans With Disabilities Act





# Americans with Disabilities Act (“ADA”)

- ▶ Covers all employers with 15 or more employees.
- ▶ Prohibits discrimination in employment on the basis of a disability:
  - ▶ Disability defined as “a physical or mental impairment that substantially limits a major life activity.”
  - ▶ Can also have a record/history of disability or be regarded as having a disability.
  - ▶ Must also be qualified to perform the essential functions or duties of a job, with or without reasonable accommodation.
  - ▶ Employer obligated to provide a reasonable accommodation.
  - ▶ Must engage in the interactive process when applicant or employee requests a reasonable accommodation.



# Scenario

Greg, a new employee, injures himself off the job in an accident while on his four-wheeler. He asks you to assign him to a job with light duty.

- What should you do now?
- What laws should you consider?
- What documents or policies should you review?



# What Is A “Disability”?

An individual with a disability is a person who has:

- ▶ A physical or mental impairment that substantially limits one or more of the major life activities
- ▶ A record of having such impairment
- ▶ Is regarded as having such an impairment



# Not Impairments

- ▶ Physical characteristics
  - Eye color, hair color, etc.
- ▶ Personality traits
  - Bad temper, etc.
- ▶ Environmental, cultural, and economic characteristics
  - Poverty, lack of education, illiteracy, or a prison record
- ▶ Sexual orientation



# Temporary Or Intermittent Conditions

- ▶ A temporary or intermittent condition is an impairment that is *“episodic or in remission is a disability if it would substantially limit a major life activity when active”*
- ▶ Examples:
  - Cancer
  - Epilepsy
  - Lupus
  - Asthma



# Temporary Or Intermittent Conditions

- ▶ Temporary, non-chronic conditions of short duration that have little or no long-term or permanent impact are typically NOT impairments, for example
  - Flu
  - Pneumonia
  - Broken bones
  - Appendicitis
  - Sprained joints
  - Concussions, etc.



# Mitigating Measures

- ▶ Effects of mitigating measures shall not be considered when determining whether an impairment substantially limits an MLA
  - ▶ Other than ordinary eyeglasses or contact lenses
- ▶ Still relevant to reasonable accommodation analysis
- ▶ Side effects of medications can create a disability



# ADAAA Best Practices

- Don't nit-pick whether the condition is a disability - it probably is
  - Keep an open mind in the interactive process
  - Focus on accommodations
  - Request documentation from qualified medical personnel before making accommodations
  - Every employee request and adverse job action based upon a medical condition should be considered as a potential ADA claim
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# Request For Accommodation

- ▶ The burden is on employer to recognize accommodation request
- ▶ No formalities required
- ▶ Accommodation requests need not come directly from employee
  - ▶ Spouse
  - ▶ Parent
  - ▶ Physician
  - ▶ Job coach
  - ▶ Union rep



# Request For Accommodation

- There must be an individualized inquiry and an interactive process to determine what accommodations are appropriate and needed
- Recognize and handle accommodation requests
  - Do not say accommodation cannot be provided!
  - Refer to HR or other appropriate resource
  - Protect confidentiality
  - Ensure employee who receives an accommodation is not mistreated by co-workers



# Timing Of Requests

- Reasonable accommodation requests may be made at any time
  - An employee does not lose the right to request an accommodation because s/he did not do so during the application stage
  - Employees may make more than one request for reasonable accommodation
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# Reasonable Accommodation Examples

- ▶ Making existing facilities accessible to disabled individuals
- ▶ Acquiring or modifying equipment or devices
- ▶ Job restructuring
- ▶ Part-time or modified work schedules
- ▶ Reassigning to a vacant position
- ▶ Providing qualified readers or interpreters
- ▶ Adjusting or modifying examination, training materials, or policies



# NOT Reasonable Accommodations

- Creating a new job
- Creating a light-duty position
- Bumping another employee
- Promoting the disabled worker
- Providing personal equipment (wheelchair, hearing aid, etc.)
- Eliminating essential functions
- Lowering production or performance standards
- Excusing misconduct



# The Interactive Process

- ▶ Failure to engage in the interactive process has significant legal consequences
- ▶ Some courts have held such failure is a *per se* ADA violation
- ▶ Some courts have found employers' failure to engage in the interactive process constitutes evidence of bad faith

# Direct Threat Exception

An exception for employers who refuse to hire or employ persons who pose a “direct threat” to the health and safety of other employees or other persons associated with the business

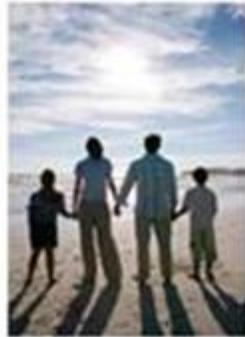




# Factors For Meeting Direct Threat Exception

- Nature of risk
  - Duration of risk
  - Severity of risk
  - Probability of harm
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# FMLA Basics





# Family and Medical Leave Act ("FMLA")

- General Provisions

- Up to 26 weeks of leave 12-month period

- To care for child, parent, or spouse who is a covered servicemember and suffered a serious injury or illness in the line of active military duty

- Who is eligible?

- The employee must have worked at least 1,250 hours during the 12 months prior to the start of **FMLA** leave.

- The employer is one who employs 50 or more employees within a 75-mile radius of the worksite.



# Family and Medical Leave Act ("FMLA")

- ▶ General Provisions

- ▶ Up to 26 weeks of leave 12-month period

- ▶ To care for child, parent, or spouse who is a covered servicemember and suffered a serious injury or illness in the line of active military duty

- ▶ Who is eligible?



# Family and Medical Leave Act ("FMLA")

## Eligibility:

- 1250 hours in most recent 12 months
- Birth/adoption, prenatal care
- Care for the employee's spouse, child, or parent with a "serious health condition"
- Employee's own "serious health condition"
- Military related time away from work needed



# Family and Medical Leave Act ("FMLA")

- ▶ Points to consider:
  - ▶ Don't ignore absences
  - ▶ Don't play doctor
  - ▶ Start the clock running
  - ▶ Run leaves concurrently
  - ▶ Seek assistance early
  - ▶ Use right forms and follow company procedures
  - ▶ Only allow temporary light duty jobs
  - ▶ Document leave requests and respond to them in writing
  - ▶ Require appropriate medical information
  - ▶ Don't encourage employee to "just quit!"



# Scenario

Sue's mother is suffering from a chronic medical condition. She requests FMLA leave to take her mother to Las Vegas before she is too frail and unable to travel.

- What should you do now?
- What laws should you consider?
- What documents or policies should you review?



# Communication With An Employee's Doctor

- ▶ After employer has given employee an opportunity to cure any deficiencies in the medical certification, the employer may:
- ▶ Contact the employee's health care provider for clarification and/or authentication
  - ▶ Clarification - Help in understanding the handwriting on the medical certification or the meaning of a response
  - ▶ Authentication - Requesting verification that the information was completed and/or authorized by the health care provider



# Communication With An Employee's Doctor

- ▶ Make contact through health care provider, HR professional, leave administrator, or management official
- ▶ Employers may not ask health care providers for additional information beyond that required by certification form
- ▶ It is employee's responsibility to clarify a medical certification
- ▶ If employee or family member chooses not to authorize disclosure of health care information, employer may deny FMLA leave on grounds that certification is unclear



# Fitness-For-Duty Testing

- If employee uses FMLA leave due to their own serious health condition, employer may require a fitness-for-duty medical certification as a condition to restoration
- Best practice: Attach job description
- Similarly-situated employees must be required to provide such documentation
- Policy must be communicated directly to employee before FMLA leave starts

# Fitness-For-Duty Testing

- What type of medical certification may be required?
  - Address employee's ability to perform essential job functions
- Employer should give employee a list of essential job functions and state that the certification must clear him or her to do those functions



Fitness-For-Duty  
Exams



# Fitness-For-Duty Testing

- Employers may request fitness-for-duty certifications of employees on intermittent FMLA leave, up to once every 30 days, if there are reasonable safety concerns
  - Employer may seek clarification or authentication from employee's physician
  - No second or third opinions
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# TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- Summary

- ▶ Applies to employers engaged in interstate commerce with at least 15 employees
- ▶ Prohibits discrimination because of race, color, national origin, religion, sex, pregnancy

- Penalties

- ▶ Employees or EEOC can sue for back wages, reinstatement, promotion, attorney's fees
- ▶ For intentional discrimination, employees can sue for compensatory and "capped" punitive damages
- ▶ Jury trial allowed
- ▶ Rule 23 class action available

# ADEA

## Age Discrimination in Employment Act

- Summary

- Employers engaged in interstate commerce with at least 20 employees
- Prohibits age discrimination in employment, including benefits
- Covers employees 40 years of age or over

- Penalties

- Employees or EEOC can sue for back wages with jury trial
- Can sue for attorney's fees
- Double damages if violation is willful
- Opt-in class action available



# Hostile Work Environment

- Based on a protected characteristic.
- Objectively *severe and pervasive* enough to create a work environment that a *reasonable person* would find hostile or abusive.
- Hostile work environment cases are often difficult to recognize, because the particular facts of each situation determine whether offensive conduct has crossed the line from "**ordinary tribulations of the workplace**, such as the sporadic use of abusive language... and occasional teasing," to unlawful harassment.

# Final Questions



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