

Untangling ADA, FMLA & Worker's Compensation Issues

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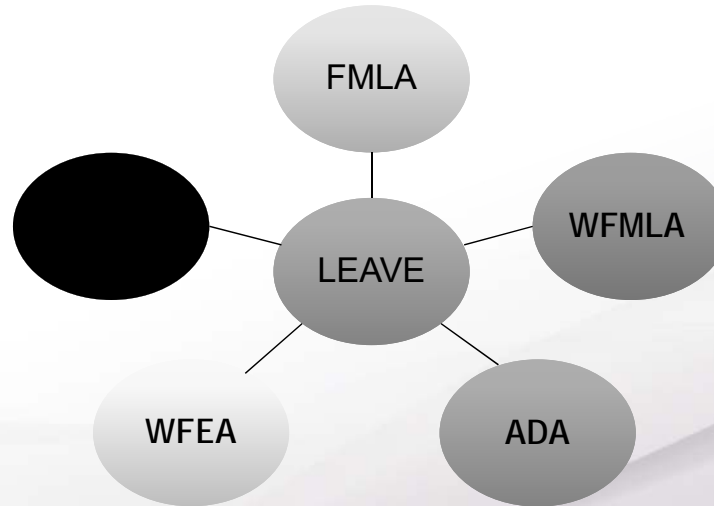
Roadmap

- (1) When Do These Laws Come Into Play?
- (2) Length of Leave Permissible Under Each Law
- (3) Permissible Medical Inquiries Under Each Law
- (4) Wages and Benefits During Leave
- (5) Offering Light Duty
- (6) Mandating Light Duty
- (7) Reinstatement Obligations
- (8) Termination
- (9) Running Leaves Concurrently
- (10) Common Employer Pitfalls

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1. When Do These Laws Come Into Play?



Employer Applicability: Public Sector

- ADA
 - State and local government employers are “employer[s]” if they meet the statutory criteria set forth in Sec. 12111(5)(A).
 - 15 employees; *Excludes*: United States, federal Indian tribes
- FMLA
 - Covers any “public agency,” including the United states, a State or political subdivision thereof
 - “Public agencies are covered employers without regard to the number of employees employed.” 29 CFR § 825.104.
- State Sovereign Immunity

Employee Eligibility: FMLA & WMFLA

FMLA

- Works at a worksite with 50+ employees or for an employer who has 50+ employees within 75 miles of that worksite;
- Has worked for the employer for at least twelve months;
- Has worked at least 1,250 hours over the 12-month period prior to the date leave commences

WMFLA

- Been employed by employer with 50+ permanent employees for more than 52 consecutive weeks; and
- Worked for that employer for at least 1,000 hours during the preceding 52-week period

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Employee Eligibility: ADA & WFEA

Americans with Disabilities Act (ADA)-- 15+ employees

- Employee must be "qualified individual with a disability"
 - Has a "physical or mental impairment that substantially limits one or more major life activities";
 - "Has a record of such impairment"; or "regarded as having such impairment"

Wisconsin Fair Employment Act (WFEA)

- Employee must be an "individual with a disability"
 - has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work (typically must be permanent);
 - has a record of such impairment; or is perceived as having such an impairment

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Employee Eligibility Worker's Compensation Law

Wisconsin Worker's Compensation Act (WCA)

- Applies to most Wisconsin employers
 - 3+ workers on a full-time or part-time basis
- Conditions of liability

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2. How Long May an Employee Be Gone on Each of These Types of Leave?



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Length of Leave: Family and Medical Leave Laws

Federal Family and Medical Leave Act (FMLA)

- Up to 12 weeks of job-protected leave within a 12-month period

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Length of Leave: Family and Medical Leave Laws

FMLA

- May include intermittent leave and/or reduced work schedule
 - If medically necessary
- Does not preempt Wisconsin FMLA (WFMLA)

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Length of Leave: Family and Medical Leave Laws

Wisconsin Family and Medical Leave Act (WFMLA)

- Provides set amounts of leave each *calendar year*:
 - *Up to 2 weeks* medical leave for employee's own "serious health condition"

Length of Leave: Family and Medical Leave Laws

Wisconsin Family and Medical Leave Act (WFMLA)

- Right to leave is **absolute** for eligible employees
- May include intermittent leave and/or reduced work schedule

Length of Leave: Disability and Fair Employment Laws

Americans with Disabilities Act (ADA)

- May require extended leave as "reasonable accommodation" unless "undue hardship"
 - FMLA eligibility immaterial
- Duration of leave determined by what is "reasonable"
 - Individualized, case-by-case assessment
 - Indefinite leaves
 - Hard-and-fast policies

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Length of Leave: Disability and Fair Employment Laws

Wisconsin Fair Employment Act (WFEA)

- Requires employer to provide leave as "reasonable accommodation" unless employer can show hardship
- Amount of leave determined by what is "reasonable"
 - Fact-specific inquiry necessitating individualized assessment
 - Avoid broad, inflexible policies

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Length of Leave: Worker's Compensation Act

Wisconsin Worker's Compensation Act (WCA)

- No statutory limit on the amount of leave
- Contingent on nature/severity of the work-related injury
- Section 102.35(3), Wis. Stats: "Refusal to Rehire"

3. What Types of Medical Information May an Employer Request to Determine an Employee's Eligibility for Each of These Types of Leave?

Medical Information: ADA & WFEA

- Employer may request reasonable documentation of an employee's functional limitations from health care provider if:
 - Job-related; and
 - Consistent with business necessity
- Reasonable documentation must be limited to information necessary to demonstrate or determine:
 - Existence of a disability, and
 - Necessity for an accommodation
- Cannot request an employee's complete medical records
- Employers should include GINA warning (sample in regulations)

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Medical Information: WCA

- Much broader access to employee medical information
 - Employee waives physician/patient privilege when filing claim under WCA
 - Wis. Stat. § 102.13(2)(a)
- Employer (and insurance carrier) can evaluate liability
 - Documentation establishing employee's injury and relationship to employment

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Medical Information: FMLA & WFMLA

FMLA

- When employee requests leave for his or her own “serious health condition,” the employer may, within five days, seek an initial medical certification of the need for leave containing:
 - Date “serious health condition” began
 - Probable duration of condition
 - Statement indicating that employee is unable to perform one or more of the essential functions of his or her position due to the “serious health condition” - include list of job functions
- Employers should include GINA warning

Medical Information: FMLA & WFMLA

WFMLA

- Can require certification for the serious health condition of an employee
- Cannot require the certification to state more than:
 - That the employee has a serious health condition;
 - Date the condition began and its probable duration;
 - Known medical facts regarding the condition; and
 - For medical leave, an explanation of the extent employee is unable to perform his or her employment duties

Medical Information: FMLA & WFMLA

FMLA

- Employee must provide requested certification (completed by employee's health care provider) to the employer within 15 calendar days after employer's request
 - Unless not possible despite employee's good-faith efforts or unless employer allows more time
 - Certification must specify what essential job functions employee is unable to perform

Medical Information: FMLA & WFMLA

FMLA

- Employer must advise employee if the employer deems the certification incomplete or insufficient
- Employee's obligation is to provide employer with a complete and sufficient certification and to clarify the certification if necessary

Medical Information: FMLA/WFMLA

If employee provides a complete but questionable certification form...

- Employer may seek a second opinion (at own expense) from a doctor not regularly employed by employer
 - **WFMLA:** Employer can pick any doctor

If initial certification and second opinion conflict...

- Employer may seek a third (final, binding) opinion at employer's expense from a health care provider mutually agreed upon by employee and employer
 - **WFMLA:** Department of Workforce Development appoints third doctor; cost split among employer and employee

Medical Information: FMLA & WFMLA

Recertification of "Serious Health Condition" (In ALL cases, employer can request recertification every six months)

- Employer can generally request "recertification" no more often than every 30 days. For conditions lasting 30+ days, employer must wait until initial certification period has passed.
- Employer can request before 30 days if:
 - Employer has received information raising suspicion as to the validity of the employee's initial certification
 - Circumstances described in the original certification have changed
 - Employee requests an extension of the leave

Medical Information: Fitness-For-Duty Examinations

ADA

- Must be job-related and consistent with business necessity
 - Can employee perform job functions?
 - Is accommodation necessary?
 - Will accommodation be effective?

WCA

- Employee's health care provider to certify that the employee may return to work, either in a light duty position or at his or her regular job

Medical Information: Fitness-For-Duty Examinations

FMLA & WFMLA

- Employer may require (at own cost) where employee returning from regular leave relating to own serious health condition
- Must notify employee of need for exam no later than the FMLA designation notice
- Must be uniform policy
- Only as to medical condition that necessitated leave
- Employers may not require a second or third opinion on a fitness-for-duty certification

4. What Wages & Benefits Must Be Provided to an Employee on Leave?

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Benefits During Leave: FMLA & WFMLA

- Must maintain employee's group health insurance coverage for duration of leave
 - At same level/under same conditions
 - Can require employee to pay his/her ordinary portion
- Employees on FMLA leave do not continue to accrue vacation, PTO and sick time
 - Unless employer policy allows employees on other types of unpaid leave to continue to accrue these benefits

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Benefits During Leave: ADA & WFEA

- No specific accrual or continuation rights for any benefits
- Must continue benefits for an employee out on disability leave if same benefits are provided for other employees on similar leaves

Example: If employee on short-term disability leave continues to accrue PTO, employee on ADA/WFEA leave must also accrue PTO

Benefits During Leave: WCA

- No specific accrual or continuation rights for any benefits, depending on employer's policies (employer cannot discriminate)
- Employer does not have to continue group health insurance coverage
 - BUT benefits continue if WC/FMLA run concurrently
- WCA Benefits

Pay Status During Leave: ADA & WFEA

- Unpaid, unless the employer otherwise pays other employees on a similar leave status
 - E.g., if an employer provides all employees with a month of paid sick leave, that employer must pay an employee who takes such sick leave because of a disability
- Employer must allow employee to use any accrued paid leave first

Pay Status During Leave: FMLA

- Unpaid unless employer provides a paid leave of absence benefit
- Employee may elect or an employer may require the employee to use any accrued vacation leave, personal leave or PTO during federal FMLA leave (runs concurrently)
- Employer may designate short-term disability or worker's compensation leaves as FMLA leaves

Pay Status During Leave: WFMLA

- Medical leave is unpaid except an employee may elect to (but not be required to) substitute paid leave of *any other type* provided by the employer.
- Employee may substitute any accrued leave (paid/unpaid)
 - Substituted leave may be designated by employer as WFMLA leave
 - Employee who substitutes employer-provided leave for WFMLA leave is entitled to any benefits that would normally accrue to the employee when otherwise taking this employer-provided leave (e.g., wages, seniority, etc.)
- Wisconsin courts have allowed an employee to substitute disability leave when the employee is not in fact disabled, but is taking FMLA leave for another reason

Pay Status During Leave: FMLA + WFMLA

- Employees entitled to receive any *unconditional* increases in pay while on leave
- Employees not entitled to pay increases or bonuses conditioned on length of service, seniority

Pay Status During Leave: WCA

- Paid leave (at least in part)
- Employer may not require *substitution* of accrued paid leave
 - But employers and employees may agree to have accrued paid leave *supplement* workers' compensation benefits (where < 100%)
 - Employer may require or employee may elect to substitute accrued paid leave when workers' compensation benefits end
- Leave due to a work-related injury covered by the WCA may be counted against an employee's FMLA and WFMLA entitlement (if employer so designates)

5. Must an Employer Offer Light Duty Work, Part-Time Work, or Job Restructuring to Employees on These Types of Leave?

Light Duty Work: WCA

- Not mandatory, but may eliminate or reduce employee's entitlement to the wage replacement benefit
- If WC injury is also "serious health condition," employee may remain on FMLA leave until employee can return to pre-injury job or until the 12 weeks of FMLA leave is exhausted

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Light Duty: FMLA

- Employer may offer (but does not have to)
- Employee not required to take a light-duty assignment
- Time in a light-duty assignment MAY NOT be counted against employee's FMLA leave allotment
- Acceptance of light-duty work does not waive employee's FMLA restoration rights
 - But an employee who voluntarily returns to a light duty position retains the right to job restoration to the "same or equivalent position" until the end of the 12-month period that the employer uses to calculate FMLA leave

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Light Duty: ADA

- Does not require employer to create a light duty position as a reasonable accommodation
- Per EEOC, employer **should consider** placing employee in light duty position if:
 - Employer already reserves such positions for employees with occupational injuries; and
 - Employer has a vacant light duty position for which employee is qualified

Light Duty: WFEA

- Reasonable accommodation requirements of WFEA do not require employer to convert a temporary light duty position to a permanent position for an employee with a disability
 - Would render position unavailable for the purpose for which it was created
 - *Rousseau v. Appleton Papers, Inc.* ERD Case. No. CR200702495 (12/03/2010)

Light Duty: ADA & WFEA

- Reassignment to light duty position need only be temporary if position was created as a temporary job
- Light duty work should be detailed in a job description
- Be clear and consistent

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Light Duty and Job Restructuring: ADA & WFEA

ADA

- May have to reallocate marginal job functions an employee is unable to perform due to disability
- Not required to reassign essential job functions to create new light duty position

WFEA

- May have to reassign even essential job functions unless undue hardship

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Intermittent/Reduced Leave: FMLA and WFMLA

Intermittent Leave: Leave for a single illness or injury but taken in separate blocks of time

Reduced Leave: Leave schedule that reduces employee's normal working hours per workday or per workweek

- Each permitted where medically necessary for care/treatment of employee's serious health condition.
- Can require temporary transfer to alternative position better suited for recurring periods of leave. *If WFMLA applies:* by mutual agreement
- Can require employees to furnish dates and duration of planned treatment

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Intermittent/Reduced Leave: WCA, ADA and WFEA

WCA

- Where needed for appropriate care and treatment of employee's work-related injury

ADA

- Part-time work and modified work schedules may be available as reasonable accommodation where effective and not an undue hardship

WFEA

- Accommodations might include offering part-time or flexible work schedules

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6. May an Employer Insist Upon an Employee's Acceptance of a Light Duty Position?

Mandatory Light Duty?: WCA

- Employer may offer but not force
- Employee may lose benefit eligibility

Mandatory Light Duty?: FMLA

- Employer may offer as alternative to FMLA leave
- Employee can accept a light-duty position or continue on FMLA leave until able to return or until amount of FMLA/WFMLA leave expires
- Once FMLA expires, employer may require that the employee accept the light duty position as a condition of continued employment

Mandatory Light Duty?: ADA & WFEA

- Per EEOC, employer may choose among reasonable accommodations so long as chosen accommodation is effective
- Where employee is covered by the ADA but not by the FMLA or WCA, must accept light duty as long as it is an "effective" reasonable accommodation

7. What Are An Employer's Reinstatement Obligations Upon an Employee's Return from Leave?

Reinstatement: WCA

- Employer is not required to hold or create a job to guarantee the employee a job after an injury
- May not "unreasonably" refuse to rehire an injured employee if suitable employment is available within the employee's physical and mental limitations
- Employer may face penalty of up to one year's wages for refusing to rehire an employee after a compensable injury

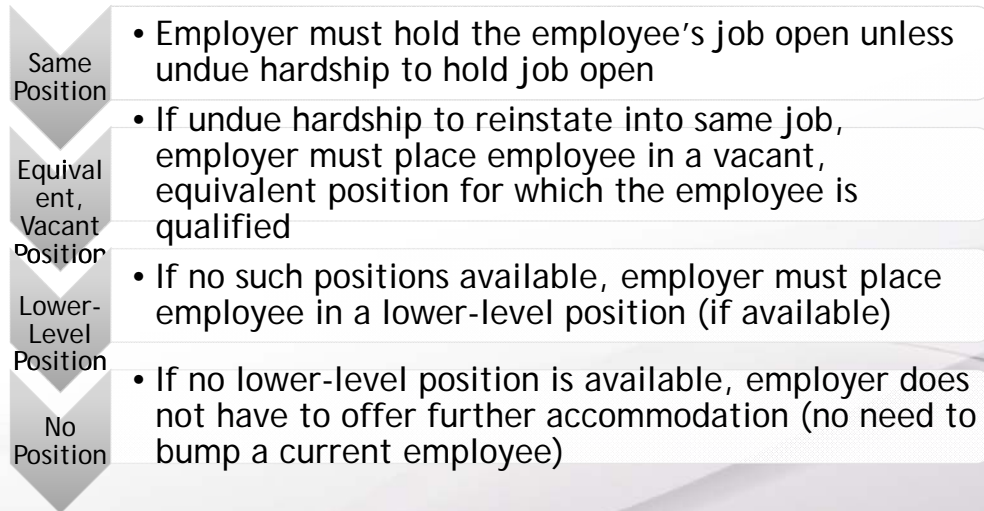
Reinstatement: FMLA

- Employee who takes leave is entitled to return to his/her previous job or an equivalent position

Reinstatement: FMLA

- Employee who is medically incapable of doing the essential functions of the job does not have right to another job
- Employer may deny reinstatement if employee would not otherwise have been employed at the time reinstatement is requested
- Employer may, with notice, deny reinstatement to certain "key employees"
 - 10-percent highest paid of all employees within 75 miles
 - Necessary to prevent "substantial and grievous economic injury"

Reinstatement: ADA & WFEA



8. How Long May an Employee Be Gone on Each of These Types of Leave Without Losing His/Her Job?

Termination: WCA

- No statutory time limit
- Must rehire if suitable employment is available within the employee's physical and mental limitations (unless "reasonable cause")

Termination: FMLA & WFMLA

- 12 weeks (federal)
- 2 weeks (WFMLA)
- Employee cannot be terminated while covered under FMLA & WFMLA

Termination: ADA & WFEA

- Cannot terminate an employee just because they lack or have exhausted FMLA/WCA eligibility
- Disabled employee entitled to any effective reasonable accommodation (including additional unpaid leave)
- Duration of leave determined by what is "reasonable"
 - Individualized, case-by-case assessment
 - Leave must enable employee to perform "essential functions" upon return
 - Indefinite leaves generally not "reasonable"
 - Hard-and-fast "return from leave" policies disfavored
 - EEOC targeting employers with blanket policies mandating termination after set period of leave

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Termination: ADA & WFEA

Leave as Undue Hardship

- Difficult burden for employer to meet
- Based on individualized assessment (not blanket policy)

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Termination: ADA & WFEA

Employer may terminate employee if:

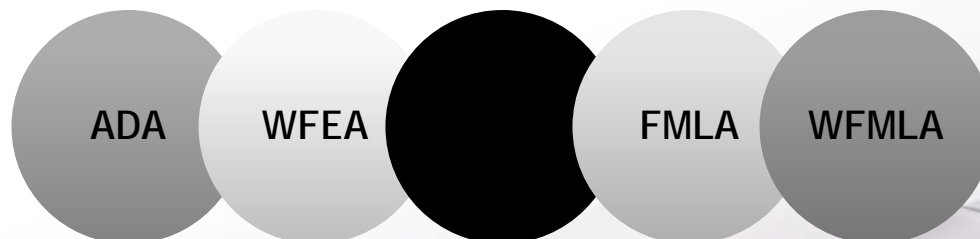
1. Additional leave would be either (a) an undue hardship on the employer; or (b) for an indefinite and/or prolonged period;
 - EEOC is against inflexible/automatic policies
 - EEOC: "more than 6 months ... beyond reasonable"
 2. There is no other effective reasonable accommodation that would enable employee to return (e.g., reinstatement to a part-time or light duty position); and
 3. Employer has no other vacant equivalent or lower-level positions for which employee is qualified, with or without accommodation
- Employer and employee should first engage in interactive process

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9. Do These Leaves Ever Run Concurrently?



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Concurrent Leave: FMLA and WFMLA

FMLA & WFMLA

- Generally run concurrently, but employees may exceed 12 weeks of FMLA leave under certain circumstances
 - E.g, 6 weeks WFMLA family leave after 12 weeks for serious health condition

FMLA/WFMLA and WCA

- Leave pursuant to WCA may run concurrently with FMLA and WFMLA
- Employer must designate

Concurrent Leave: ADA & WFEA

- Leave provided as an ADA and/or WFEA “reasonable accommodation” may run concurrently with:
 - Worker’s Compensation leave
 - FMLA/WFMLA leave

Concurrent Leave: ADA & WFEA

- Employer should still engage in interactive process to assess whether additional ADA/WFEA leave is reasonable accommodation after exhaustion of FMLA, WFMLA, and WCA

Common Pitfalls: Handling Reasonable Accommodation Requests

- Devote time/resources to exploring reasonable accommodations (instead of getting hung up on proof or documentation of an employee's disability)
- Instruct and attune supervisors to recognize potential "reasonable accommodation" requests from employees, even where employees' requests are not particularly clear - word choice not necessary
- Immediately enlist the assistance of HR after receiving request and in the interactive process to determine whether an effective accommodation can be made
- Instill understanding in managers that organization is committed to following the law, not just paying lip service

Common Pitfalls: Handling Reasonable Accommodation Requests

- Employer's best defense to an ADA/WFEA lawsuit is to show its good-faith accommodation efforts
 - Not to challenge the employee's medical condition as not constituting a "disability"
- Be proactive in engaging in the interactive process with any employees with impairments and/or any employees requesting accommodation
 - Determine essential job functions
 - Work with employee to determine how their impairment limits one or more of these essential functions
 - Collectively identify the accommodations that will overcome the limitation, and determine the efficacy/feasibility of each possible accommodation
 - Select appropriate accommodation (if applicable)

Common Pitfalls: Handling Reasonable Accommodation Requests

- Fully document your organization's efforts in the interactive process, as this process may be examined by a judge or jury
- Memorialize all of your attempts at finding a reasonable accommodation, including the rejected accommodations
 - Important to illustrate both: (1) your commitment to the process and (2) the fact that there really isn't anything you can do for the employee
- Document the fact that an employee's requested or preferred accommodation wasn't reasonable or posed an undue hardship, explaining supporting reasons in detail
- Try to secure the employee's signature on a document memorializing any agreements reached in the interactive process (employer's representatives sign and note if employee refuses to sign)

Common Pitfalls: Inflexible Leave Policies

- Reasonable accommodation under ADA/WFEA includes provision of discrete periods of unpaid leave
 - Otherwise qualified individual with a disability may be entitled to additional period of unpaid leave (even if FMLA is unavailable or exhausted) if leave wouldn't impose undue hardship
 - Requires individualized inquiry/"interactive process"
- Employers invite problems with inflexible, blanket policies that terminate an employee after a predetermined period of time on leave
- EEOC targeting these practices
 - High-profile suits and multi-million dollar settlements
 - "Companies that fail to engage in discussions with their employees about reasonable ways to accommodate their disabilities will ... invite litigation."

About the Presenters

Robert K. Sholl is a shareholder in Reinhart Boerner Van Deuren s.c.'s Labor and Employment Practice. He has been advising and defending employers in the full range of labor and employment law matters for many years.

Rob is a Phi Beta Kappa graduate of Dartmouth College, from which he received his A.B. degree *magna cum laude*, with highest distinction in his major. Dartmouth named Rob a Senior Fellow. He received a Master of Arts degree in Industrial Relations from the University of Warwick Business School, Coventry, England. He earned his Juris Doctor degree from the University of Chicago Law School.

Chambers USA: America's Leading Lawyers for Business ranks Rob in the top tier of Wisconsin Labor and Employment attorneys. He is also listed in *Best Lawyers in America*.

A well-known author and speaker, Rob is co-author of a three-volume treatise for attorneys, [Wisconsin Employment Law](#), and co-author of [Hiring and Firing in Wisconsin](#), both published by the State Bar of Wisconsin and updated annually.

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Michael J. Gentry is an attorney in Reinhart's Labor and Employment Practice. Michael represents his clients through all stages of employment counseling and litigation, as well as in traditional labor relations.

Before joining Reinhart, Michael worked as an Assistant Legal Counsel for the State of Wisconsin, Department of Administration, where he counseled and represented state agencies in labor and employment law-related matters in administrative litigation.

Wisconsin Super Lawyers has rated Michael as a Rising Star in 2015 and 2017.

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