



# *The* **Carnivale of Risk**

## **CHALLENGING EMPLOYEES AND CLAIMS IN THE NEW WORKPLACE**

### **THE ROB AND MARC SHOW 2022**

**48<sup>TH</sup> CONFERENCE & EXPO**  
**February 27 – March 2, 2022**





## CHALLENGING EMPLOYEES AND CLAIMS IN THE NEW WORKPLACE

THE ROB AND MARC SHOW 2022

### Presenters:

**Robert Cutbirth – Partner, Freeman Mathis & Gary LLP, San Francisco**  
**Marc Leibowitz – Partner, Laughlin, Falbo, Levy & Moresi LLP, San Diego**

# The “New Workplace”

– What  
Makes it  
New or  
Different?

## Remote vs. In-Office/Workplace

- Employee “investments” in alternate locations

## Finding/Retaining/Compensating Qualified Employees

- Although unemployment benefits having ended, finding qualified employees and have them regularly appear and be focused on work is difficult

## Safety and Sensitivity Issues Dominate

- There are heightened levels of concern/emotional response to “lesser” issues

## Increasing Efforts to Find Ways “Not to Work” (and not just “Millennialism”)

- Disability/LOA/“Inability” to Return to Work

## Challenges in Lines of Communication

- Finding Paths of Communication that are Effective and Accurate



# Resulting New/Further Challenges



## Financial Increases

• **Wages**

**Benefits**

**“Replacement”  
Workers**

## Workplace Disruption

• **Meeting Daily Goals**

• **Unable to Meet Goals**

**Disincentivized  
Workers/COVID Exhaustion  
Incomplete/Less Than  
Successful Work Product**

## Impacted Service Providers

• **Physicians/Care Providers  
Managers/Consultants**

**Claims**

## Race to the Formalized Claim/Lawsuit

• **Far Less Patience/Dispute Avoidance  
Resolve Claims**

**Costlier/Harder to**

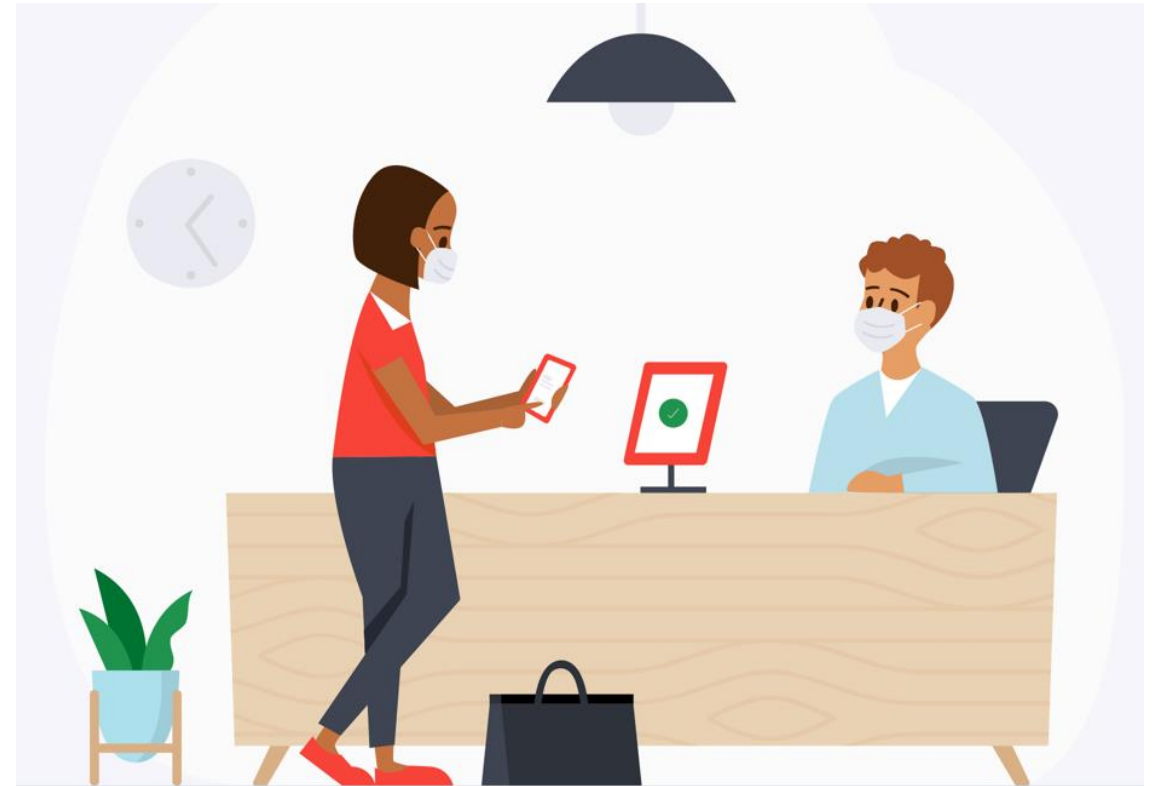
# The Impact on our Ability to Help You

- ▶ **Must Think Ahead and With Greater Consideration of Impact**
  - ▶ Nothing is as “Routine” as We Used to Think – Thorough and Strategic Beyond the “Face” of the Claim
  - ▶ Fact Investigations are More Difficult
    - ▶ In Person vs. Remote – More “Forgotten” Memories
- ▶ **Old Formulas and Approaches Need to be Reconsidered**
  - ▶ Attorneys attempting to get more; clients being grossly oversold
  - ▶ Failed Early Mediations / Fewer Options at Cost-Avoidance
- ▶ **We are Suffering the Impacts as Well in Staffing and Coordination**

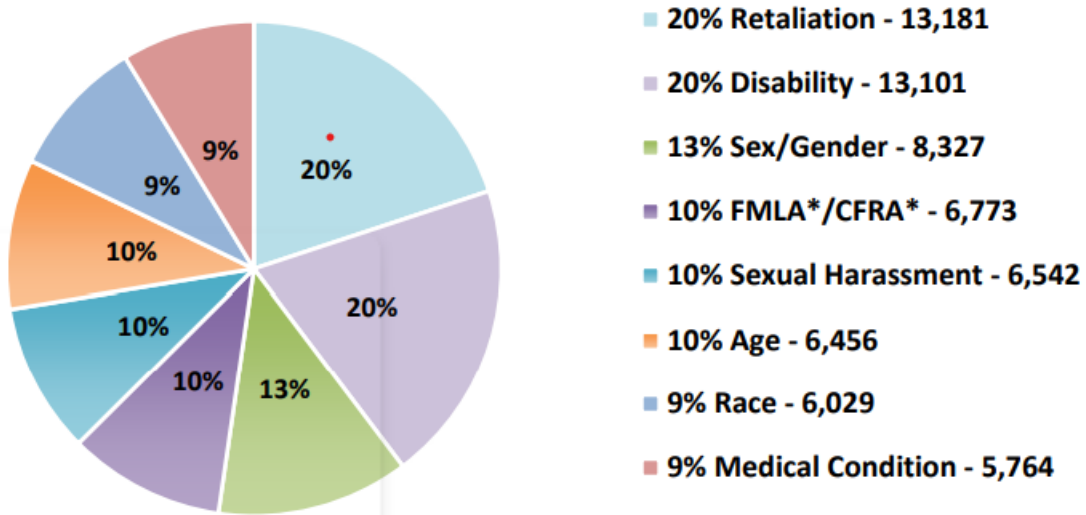


## What we Know Right Now (Which Might Change Tomorrow)

- ▶ It's Not Going Away
- ▶ Peoples' Nerves are Fried
- ▶ There are few "Easy Buttons" and "Short Cuts"
- ▶ Following Processes, and Training, Has Never been More Important



### Employment Right-to-Sue Bases



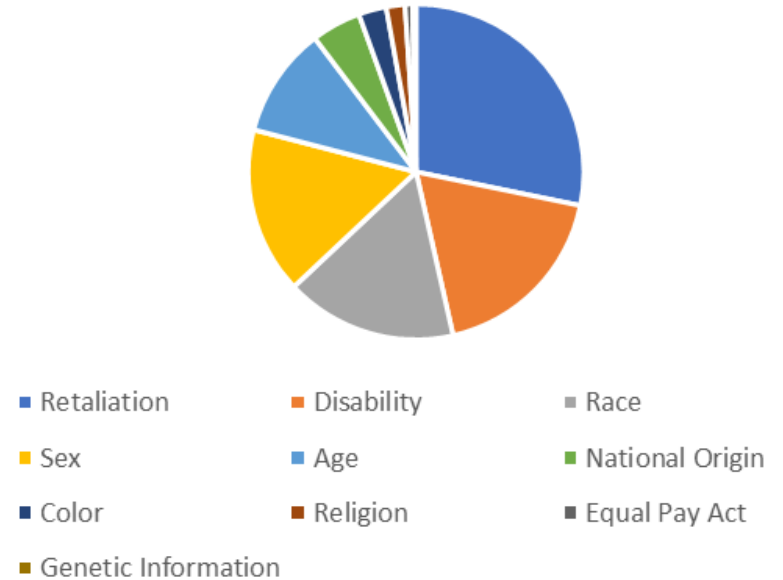
And, the ground rules have changed

- 3 Years to File a DFEH/EEOC Complaint (in most cases)
- Settlement Agreements involving “protected class” issues cannot have confidentiality and nondisparagement clauses
- Separation Agreements must tell the employee they can consult with an attorney and provide at least 5 days to consider signing the agreement
- Cost of “Nuisance” Settlements are going up

### California Specific Statistics

- FMLA/CFRA
- Retaliation is the “Overarching” Factor
- Medical Conditions (Not Just disabilities Can Trigger)

### EEOC Data



# LOA Rights/Benefits are Greater Focus

- ▶ **Laws and Regulations Changed**
  - ▶ eFMLA, COVID-19 Supplemental Paid Sick Leave (expired 9/30/21)
  - ▶ Created a Focus and Expectations That Have Continuing Repercussions
- ▶ **In Trying to be Compliant, we Have Often Shared More Information About Leaves, and Physicians are Even Easier Now to Set them Up**
  - ▶ Whether COVID, Fear of COVID, Family Members Concerns, etc, Medical “off duty”/”limited duty” notes are Now Even Easier to Get
- ▶ **And We are Forgetting about the “Rules”**
  - ▶ Forms/Approvals/Follow-ups/Documentation
  - ▶ Trying to be “Accommodating” in “Difficult” Times





# Return to Work Just Got More Complex

- ▶ **Early Return to Work is Still the Goal and Desire**
- ▶ **Harder to Get Doctor Visits/Clearances**
  - ▶ And “Short Hand” and “Incomplete” Notes are Too Common
- ▶ **If the Industrial Injury \*\* involves ongoing health-related issues, getting clearance is more difficult due to “fear of COVID”**
- ▶ **Getting the “Team” together can be more challenging**
  - ▶ TPA/Adjuster, Health Care Provider/In-House Risk Mgt. and/or HR Team

**\*\* Nonindustrial Injuries are Treated the Same as Industrial Injuries ..... Friendly Reminder**



# Notification

Direct Notification

Indirect Notification



# Leave Management

## Qualification

- Request is Complete & Timely?
- Length of Service?
- Needed Documentation provided?

## Administration

- Response (5 days) after request
- Regular Communication w/EE
- Extensions
- Evaluate non-compliance

## Closure of File

- Return to Work Release
- Accommodation Evaluation (ADA)

## LOA Forms

### Qualification

### Administration

### Closure of file

1. Workplace Leave Request

2. Certification of Health Care Provider

3. Response to Workplace Leave Request

4. Return to Work Release - Medical Leave Extension Certification

# Disability Management Process

Direct Request

Indirect Notification

Includes Intermittent Leaves/Returns from Leave

- Discuss their capabilities (what can they do; not what can't do – different from W/C focus, but necessary)
- Medical information may be necessary to determine capabilities, but “open and obvious” controls

- Disability Accommodation Medical Release authorization (voluntary; they might refuse)
- Clarify information with doctor (with authorization – care needed for Medical Privacy)

Capabilities

Medical Information

- Focus on result, not method
- Ergonomic equipment
- Additional leave
- **Change in position**
- Change in hours/tasks
- Additional breaks
- Alternate/modified duties
- Alternate position (if open/qualified)

HIPAA Does not Apply!  
CMIA Can Apply  
Lab.Code Can Have Limits

Essential Functions

Potential Accommodations

**Communication!**  
Interactive Process

- Can be a simple 1 time/1 minute discussion, but it may take several meetings and discussions
- Multiple methods of communication can be used, but face-to-face is best
- May include 3rd Parties for E'ee
- This is “informal” and non-adversarial

- Essential Functions Analysis (Can they return to work/Are they facing separation)
- Job Description
- Supervisor feedback/Performance Std. Compliance
- Regular Attendance often “essential”

- Communicate decisions timely & in writing
- Schedule follow-up to make sure accommodation is working (or not working)
- If no “reasonable” accommodation, separate “safely,” with objective written determination

**DECISION**  
Accommodation/Termination

# INFORMATION SHARING & DETERMINATIONS

W/C – Return to Work  
(not 100% release)

Separate ADA File  
(Same person OK on Multiple Events)



Non-Industrial Return to Work  
(not 100% release)

Separate ADA File  
(Same Person OK on Multiple Events)



W/C – Claim

Separate W/C File

Claim and RTW should not overlap,  
except at highest level



Civil Claim

Separate Litigation File

Claim and RTW should not overlap,  
except at highest level

Legal  
Counsel





# WHEN IN DOUBT... Slow Down (or Stop)



- ▶ **If you are not sure you have a “right” to do something ... Or Compel Someone Else to Do Something**
  - ▶ Don't be Afraid to Ask for Help
  - ▶ Ask the Employee for Permission.... Get Some Kind of a Waiver/Approval
    - ▶ May not be “Perfect” but get “Something”
  - ▶ Stop – Disengage Politely, and Say “You need to Check” and then come back later
    - ▶ Better Safe than Really, Really Sorry
- ▶ **Forms are Nice/Safer**
  - ▶ **But Outdated Forms Give me Heartburn**

# RETURN TO WORK SAFELY

## ▶ Fitness for Duty (not Post-COVID)

- ▶ Job Description/Capabilities (Make Sure they are Current)
- ▶ Proper Doctor/Proper Release (Can't be Afraid of W/C Exposures)
- ▶ Prescriptions/Emotional Limitations

## ▶ Alternate Duty/Modified Duty that Works

- ▶ Structured programs must still be flexible (not 100% Full Release)
- ▶ Match actual capabilities with actual duties

## ▶ Interim vs. Permanent

- ▶ Looking for Interim Solutions in Most Cases
- ▶ Some May be Permanent (Open/Alternate Position)



# GET YOUR LEAVES STRAIGHT...ASAP

- ▶ **FMLA/CFRA (regardless of cause)**
  - ▶ Designate ASAP
  - ▶ Limited Right to Information – **Don't Stop Here!**
  - ▶ **Limited Right to Medical Confirmation Renewals**
  - ▶ **Use State Forms/Not Federal Forms!**
- ▶ **ADA/State Laws**
  - ▶ Broader Informational Rights (But no Required Forms)
  - ▶ Limited to the Basis for the Accommodation Request
- ▶ **Collective Bargaining Agreements**
- ▶ **Must be Equally Applied – No Favorites/No Discrimination**
- ▶ **Get Your Paperwork in Order (and Documented What you Requested and When, Including Use of Your Forms)**





**Robert Cutbirth, Partner**  
**Freeman Mathis & Gary, LLP**  
**San Francisco**  
415-352-6424  
RCutbirth@FMGLaw.com



Freeman  
Mathis & Gary LLP



**Marc Leibowitz, Partner**

600 B Street, Suite 2300  
San Diego, CA 92101-4596  
619-233-9898/mleibowitz@lflm.com

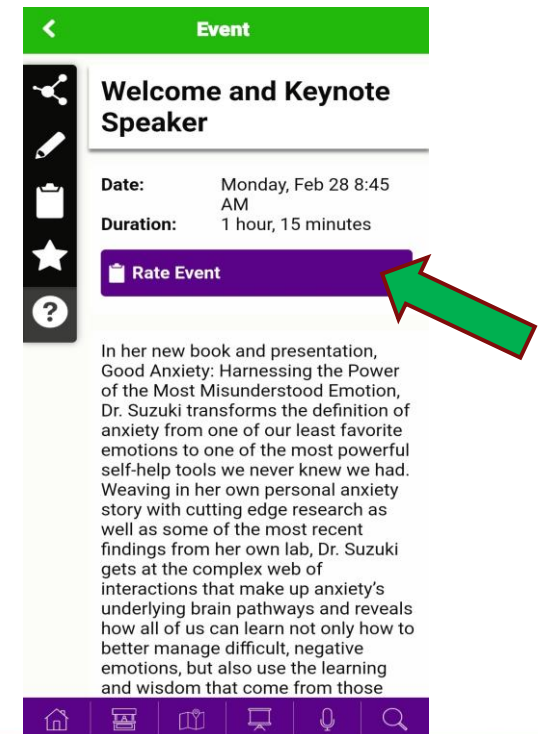
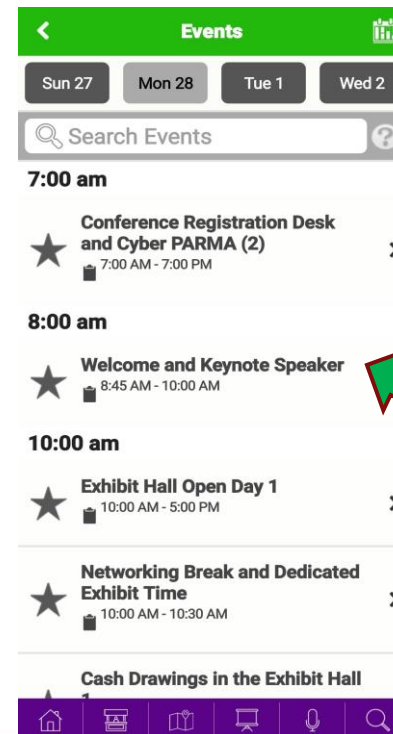
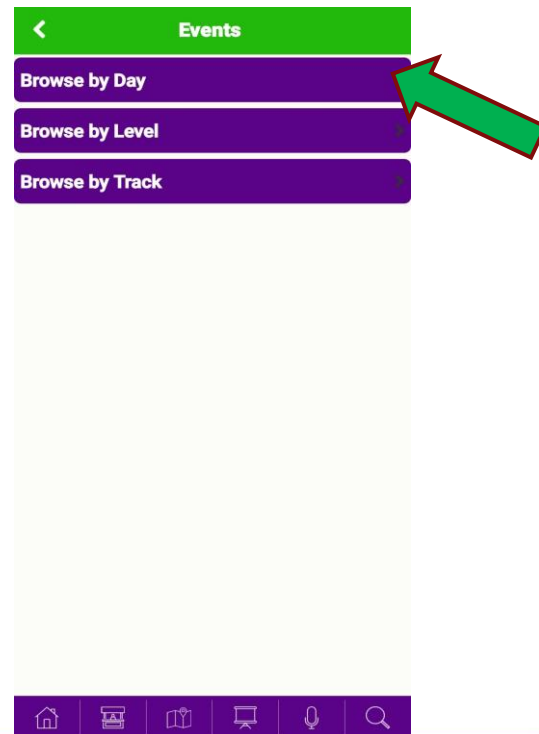






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COMPLETE SESSIONS SURVEYS ON THE APP – FIND THE APP, CLICK ON EVENTS, CLICK ON BROWSE BY DAY, CLICK ON SPECIFIC SESSION, CLICK ON RATE EVENT.



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