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MANAGING FMLA FRAUD AND ABUSE – TACTICS THAT ACTUALLY WORK

SEPTEMBER 22, 2016 ▪ MYRTLE BEACH, SC



PRESENTED BY:

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INTERFERENCE

- Return to work
 - Requiring when not allowed
- Call-in policies
 - Requiring call-ins when not permitted

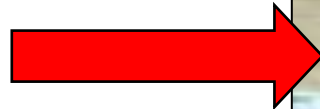


- Terminating to avoid giving the leave
- Changing hours or essential functions to force the employee to work
- Chilling (threats)
“If you take that leave, I’ll count it against you”

FMLA Abuse

- We all know some people utilize the FMLA as it was meant to be used
- We also know some people take advantage of its provisions

ON FMLA



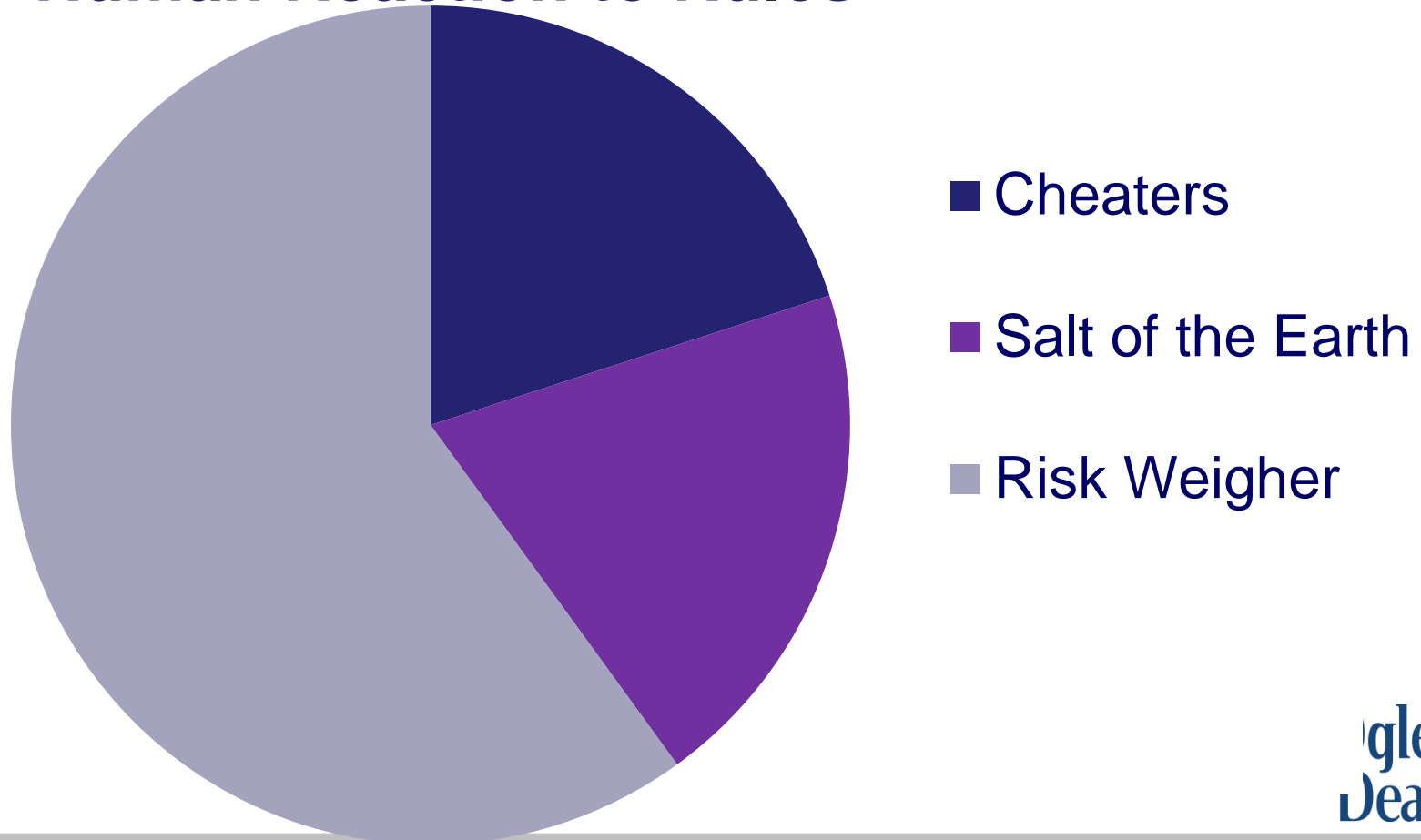
So, Our Willingness To Fight Abuse

- Depends entirely upon our confidence in the proof we have, and whether we think a court or jury would be receptive to it



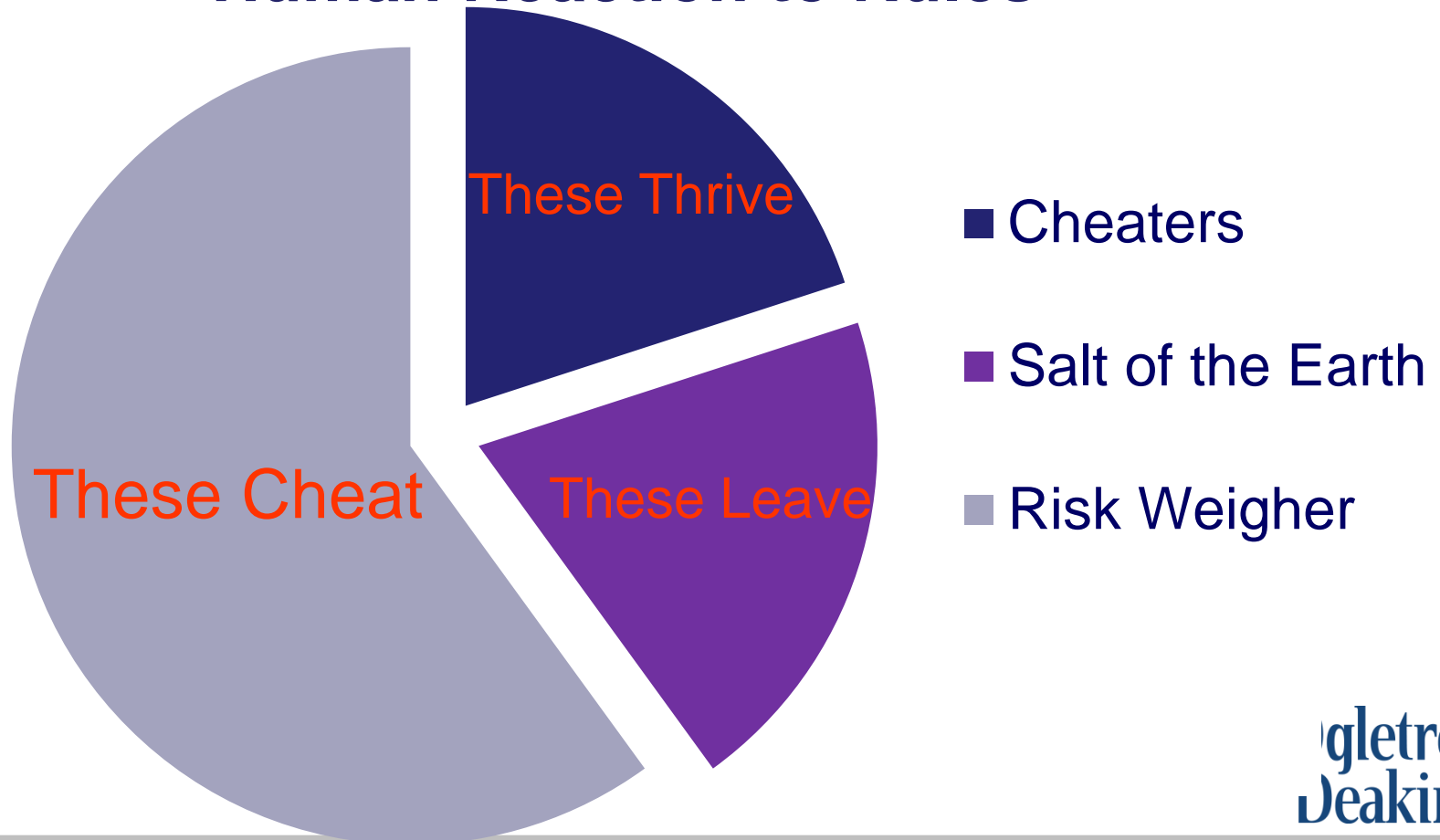
Whenever Rules Are Created

Human Reaction to Rules



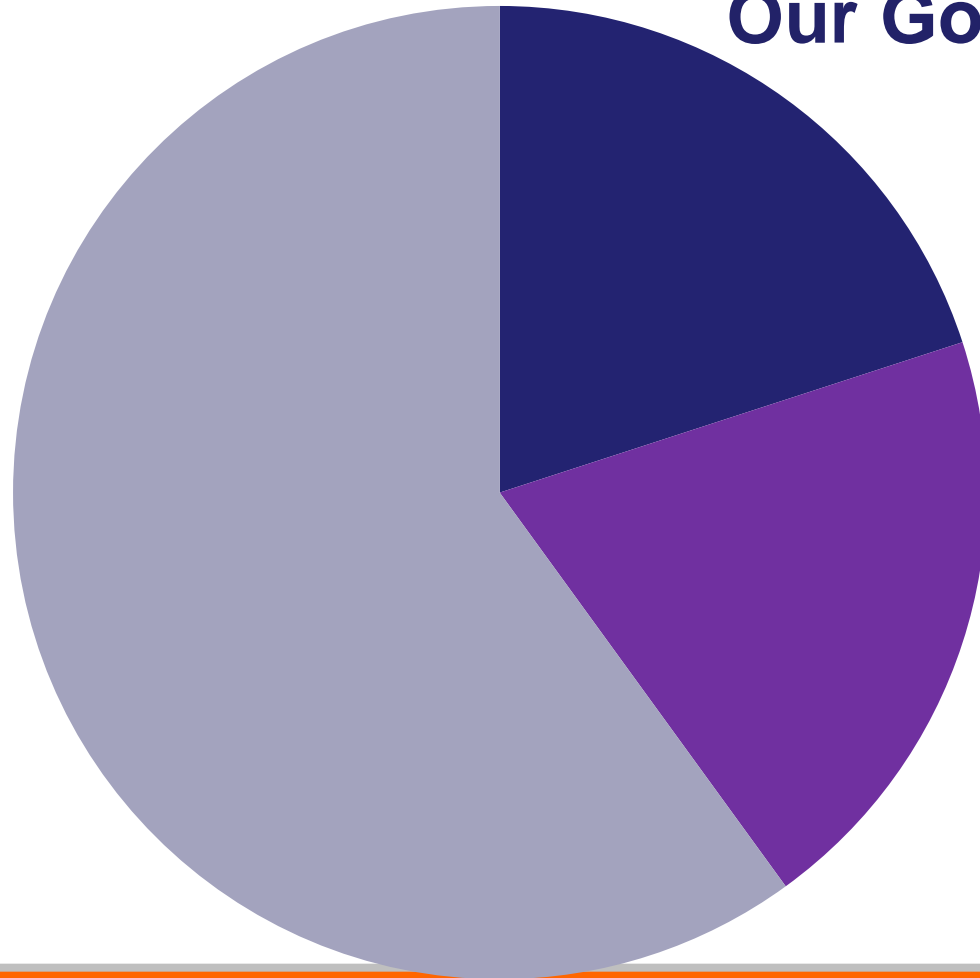
If The Rules Are Too Lax

Human Reaction to Rules



When We Create Rules

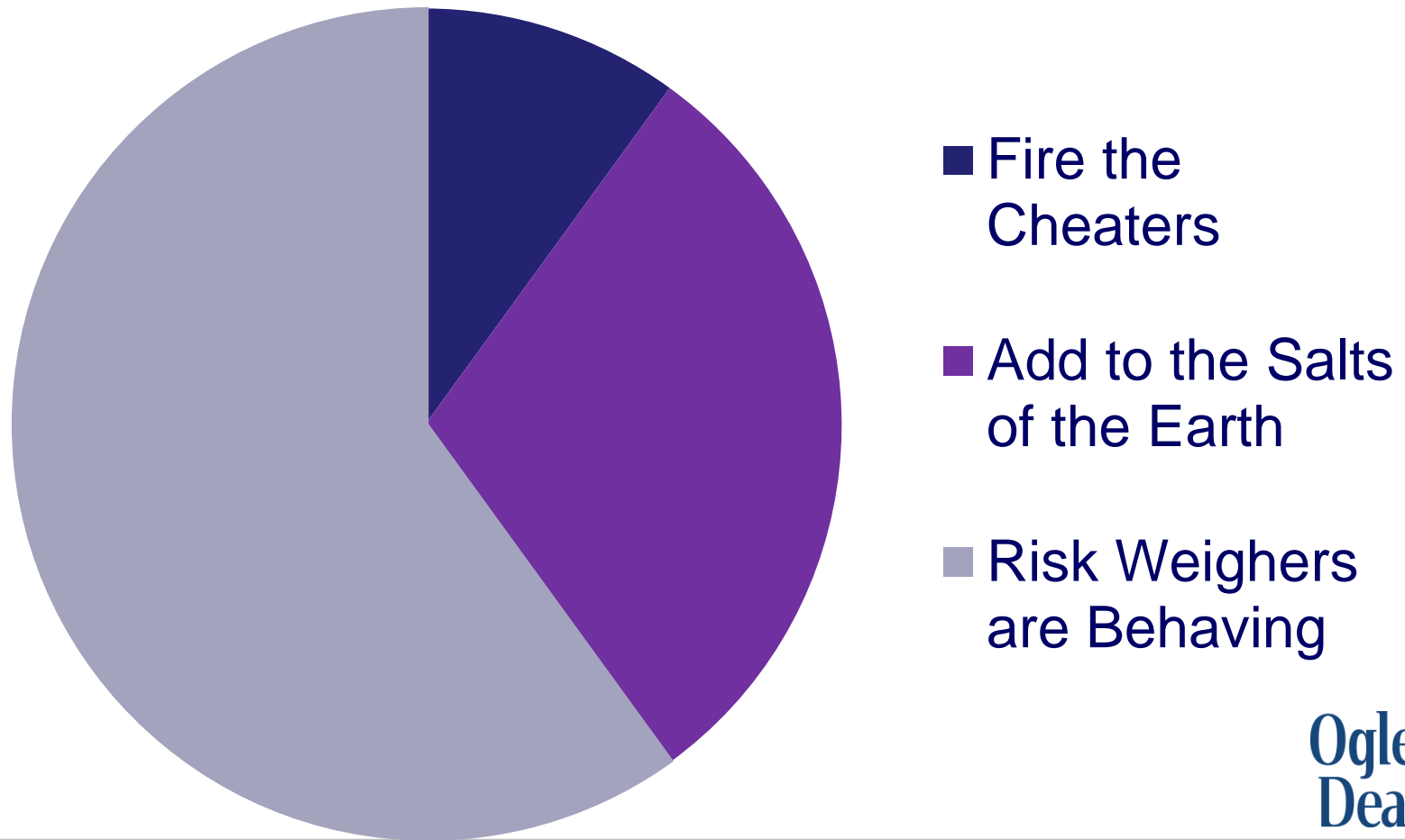
Our Goal



- Fire the Cheaters
- Add to the Salts of the Earth
- Discourage the Risk Weighers

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Our Goal is to Create Rules Designed to **Catch Cheaters** (weeding them out of the workforce) and **Discourage Risk Weighers** (**converting** them to **Salts of the Earth**)

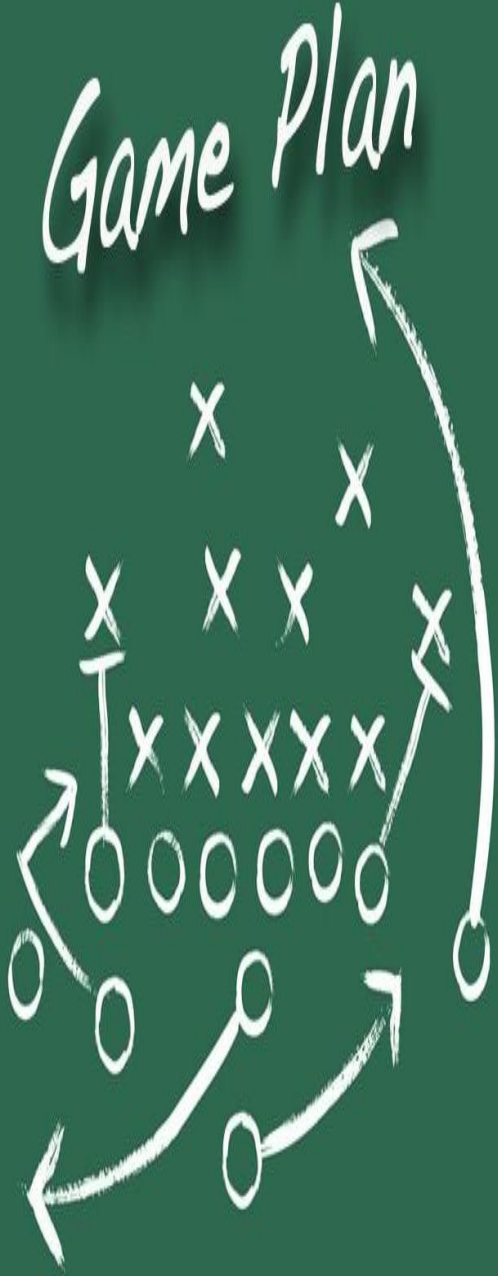


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How do you sell this case to the three types?

- How do you sell your case to a cheater?
 - They deserved to get caught
- To a risk weigher?
 - Fair? Rules in place? Explain consequences
- To a salt of the earth?
 - Damage to other employees

To Disincentive Risk Takers



- Message that we are toughening up on abuse
- Create procedures designed to make clear we will be able to catch you
- Interrogate
- Catch some cheaters

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To Catch Cheaters

- **Advanced Notice of when taking leave**
 - Strengthen Call-out Policy
 - Discipline for failure to follow
 - Push for Better Notice
 - Count absences if we receive late notice
 - Alert Leave Management Team of Patterns
- **Hyper-Accurate Information about what their life looks like when on leave**
 - Updating Job Descriptions to get more information
 - Pushing back on Certifications to make sure we are getting what we are entitled to receive
 - Engaging in the interactive process (ADA)
 - Interrogation Tactics

Call-Out Policies

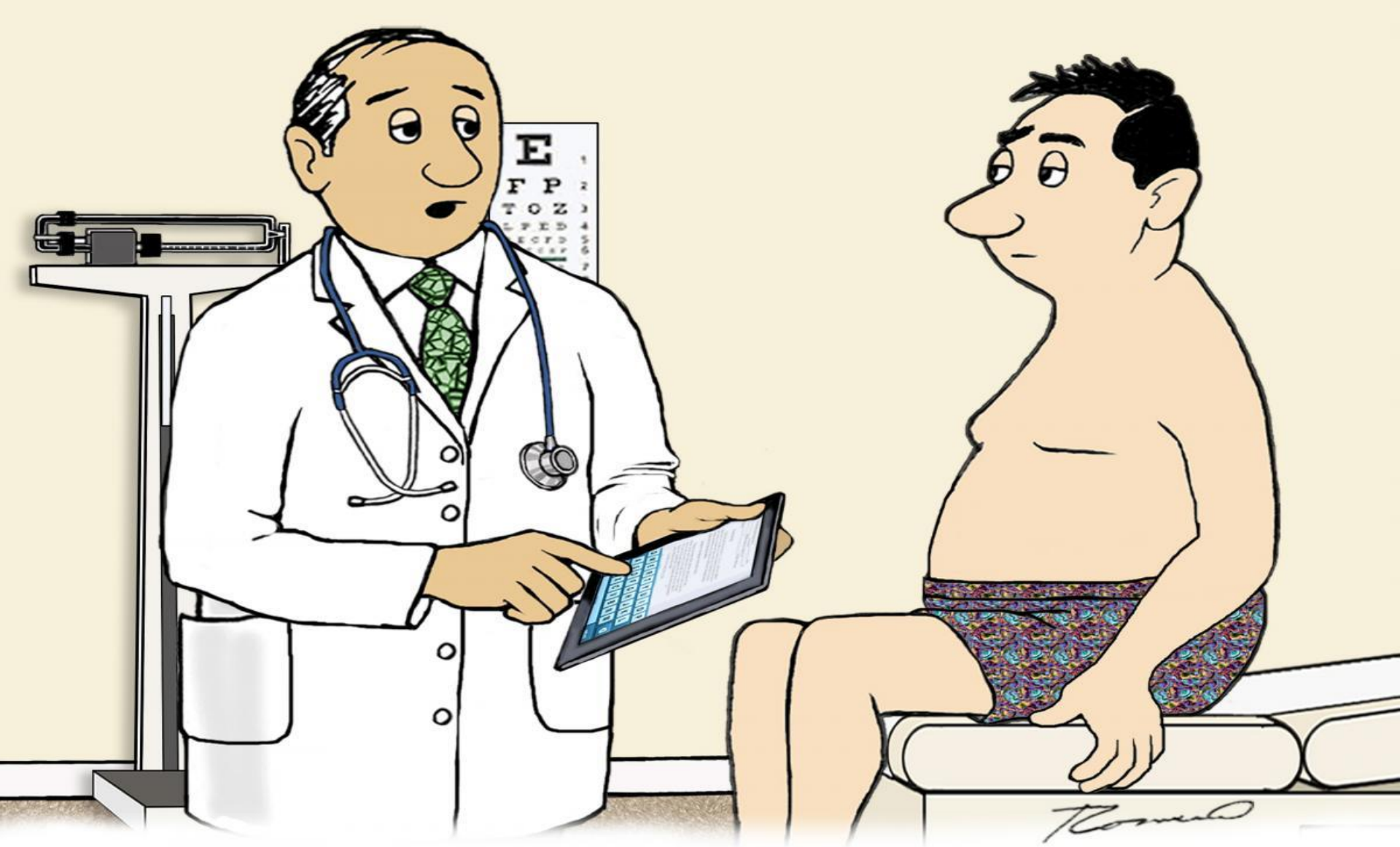
- WHO – the employee should call
 - NO MOTHERS PLEASE!!!
- WHAT – reason for absence and expected length of absence
 - ADA?
- WHEN
 - As soon as practicable and possible
- WHERE – Where must the employee report?
 - SUPERVISORS ONLY
- HOW
 - Verbal
 - NO TEXTS!!!!



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NEW Call-out Considerations

- Employer obligations under FMLA
 - Communicate with employee
 - Send information
- So, consider adding requiring employee to advise:
 - Where the employee can be reached....
 - Updates if phone or address where can be reached changes.....



"According to your HIPAA release form
I can't share anything with you."

Appropriate Questions For Persons On Intermittent Leave



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Interrogation

And when did you know that?



Just now... – Is this for incapacity or treatment?

If sooner than gave

- 1) Any early warning signs?
- 2) Incapacitated just now?
- 3) what essential functions can't perform?
- 4) how planning to get home?
- 5) Any way to get better notice

If treatment – remind of obligation to schedule during off hours or when convenient. Ask if did that. Ask how could manage to only just now learn of treatment.

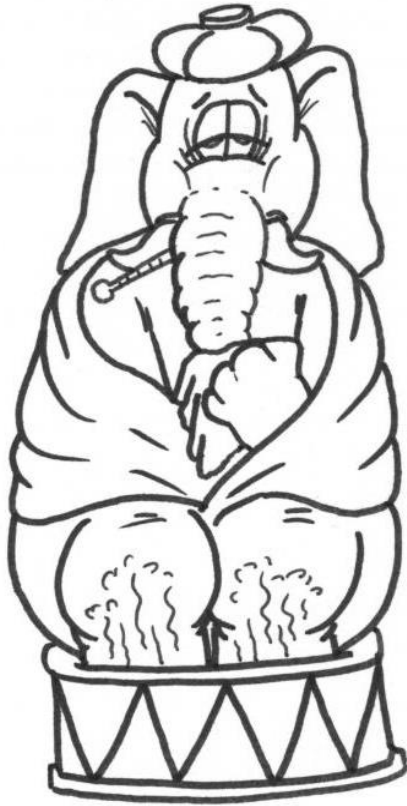
Instruct the employee that their obligation is to provide us notice ASAP, advise the leave coordinator of late notice, and follow her instructions

Interrogation On Need For Leave

- Are you sure you need to take this leave?
 - For what?
 - Is this already approved?
- Is it medically necessary that you take the leave?
- What functions can you not perform?
- Is there any way you would be able to continue working?
- How are you going to get yourself home if you are incapacitated?
- If you can drive, how can you not work?

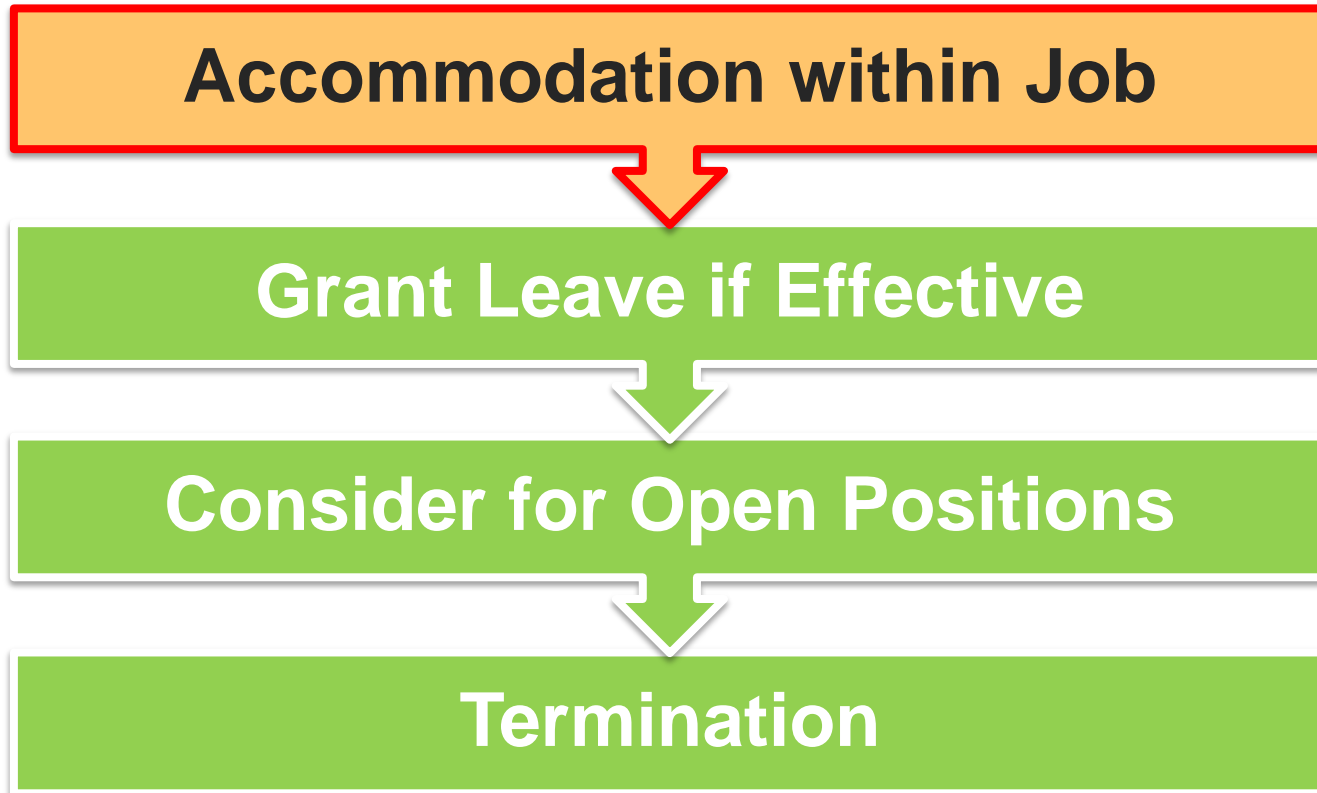
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ADA & FMLA INTERPLAY



- Employee cites his/her own impairment and a “barrier” in the workplace or wants leave

ADA Process



ADA & Leave Process Merged

Trigger: Employee cites impairment and “barrier” OR need for leave

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graph TD; A[Trigger: Employee cites impairment and “barrier” OR need for leave] --> B[Accommodation within Job]; B --> C[Consider Company Leave and FMLA]; C --> D[Grant ADA Leave if Effective]; D --> E[Consider for Open Positions]; E --> F[Termination];
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Accommodation within Job

Consider Company Leave and FMLA

Grant ADA Leave if Effective

Consider for Open Positions

Termination

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Patterns – We Want To Know About Them

- Friday/Monday or otherwise hooking onto days off
- Hooking onto Vacations planned, etc.
- Hooking onto holidays
- Pattern of not working overtime
- Tendency to take FMLA during periods of heavy work, or when moving to undesirable rotation

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To avoid a jury

Timing and reason for launching
the investigation



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Discipline/Discharge for FMLA Fraud

- Retaliation vs. Interference
 - 1st and 9th – Employer intent is not an element of interference
 - 6th – on the fence
 - Terminations for reasons other than the leave, standard is the same, but they are not sure about when you take the leave head on
 - All other circuits recognize the “honest belief” defense

Thank You!

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