

# **Return to Work Crossroads: Navigating the Intersection of Workers' Compensation, the ADA and FMLA**

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# Return To Work Crossroads: the Work Comp Piece

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## **#1 Why employers should offer light or modified work post-injury**

### **A. Statutory incentives and penalties which impact benefits**

- i. Minn. Stat. §176.101, subd. 1(e) and (i) temporary total disability benefits can be discontinued when the employee returns to work (e) or if the employee refuses an offer of work that is consistent with the plan of rehabilitation or – if no plan has been filed, the employee refuses an offer of gainful employment that the employee can do in the employee’s physical condition (i).
- ii. Minn. Stat. §176.82, subd. 2 an employer, who, without reasonable cause, refuses to offer continued employment to its employee when employment is available within the employee’s physical limitations shall be liable in a civil action for one years’ wages (note, this subdivision does not apply to employers with 15 or fewer full-time employees).

B. Mitigation of wage loss will lower the reserves and ultimate payout on a claim.

C. Mitigation of wage loss will impact the employer’s experience rating/mod factor.

D. When the employee returns to work, the employer asserts greater control over the claim direction.

E. An employee’s return to work can lift the morale of other employees.

F. The least amount of time off in early stages of a claim bodes well for future claim developments.

## **#2 How to get an employee back to work**

A. If the nurse case manager or QRC is involved, a job offer can be coordinated using either one of those professionals.

B. If no nurse case manager or QRC, direct communications with the employee can be effective (assuming no legal representation).

C. If a detailed job description is available, that can be provided to the employer’s occ med physician or the treater to have approval for the return to work.

D. An onsite job evaluation by a neutral physical therapist.

E. A Functional Capacities Evaluation and then a sign off by the treating physician.

**#3 When should light duty work be offered?**

- A. As soon as work restrictions are imposed. In other words, as soon as the employee is no longer totally disabled from a medical standpoint.
- B. It is acceptable to have transitional work until it is known if permanent restrictions will be imposed or until it is known whether the injured worker can return to the preinjury job.

**#4 What not to do**

- A. Apply the policy unevenly. In other words, only offer light duty work to “good employees”.
- B. Permit teasing or abuse by coworkers or supervisors once the injured worker has returned.
- C. Extend a vague or confusing job offer so the employee does not have a clear understanding of what will be expected in terms of work activities, hours and pay.
- D. Make significant changes in the employee’s hours of work, work location or other aspects of the job.
- E. Offer offensive work that will flare claim tensions.

**#5 When it’s not worth doing**

- A. If there is a safety risk for the injured employee. An example of this might be a PSTD claim where the employee is offered a light duty job that will expose her to flare-ups.
- B. When there is a safety risk for other employees. For example, if the employee has shown dangerous tendencies and has anger issues, it might not be worth the risk to the other employees to return the injured worker to a modified job.
- C. When the overall morale of the workforce will be adversely affected. This is a judgment call that needs to be made on a case by case basis.

**#6 What employers should do when light duty work is not available**

- A. Consider a creative job offer that will allow the employee to work remotely.
- B. Explore transitional off-site work venues.
- C. Propose a work hardening program so that the injured worker is ready to return to work when it becomes available.

D. Explore volunteer work to keep the injured worker active and to possibly increase skill sets.

**#7 What went wrong? Lessons to be learned from job offers deemed unreasonable or unsuitable.**

*Talmage v. Medtronic, Inc.*, 1982. Employee's refusal of second and third shift work was not unreasonable when she did not want to leave her daughter without supervision.

*Begin v. Thermoservice Company*, 1984. The employee did not unreasonably refuse daytime work offered by the date of injury employer when he was attending college classes during the day and had work night shift at the time of injury.

*Haldeman v. Next Innovations, Ltd.*, 2006. The employee did not unreasonably reject a dayshift job offered by the date of injury employer when he was working graveyard shift at the time of injury, in order to have his days free to complete a remodeling project.

*Hodgin v. Xcel Energy*, 2010. Employee did not unreasonably refuse job offer by preinjury employer when, at the time of the offer, he had driving restrictions, the job was at a different location and may have involved not only a bus ride, but also a taxi from the bus stop to the plant.

*Petermeier v. Centimark Corporation*, 2014. Employee has visitation on of his 9-year old son. Post-injury, he was offered a job that involved significant travel on weekends and which interfered with his visitation. Employee was found eligible for job seeking assistance to find a new job that would not interfere with his visitation schedule.

*Gilbertson v. Dingmann*, 2017. Employee's job as a mortician interfered with her family commitments. She requested accommodation by her employer and it was denied. She resigned from employment and subsequent to her resignation, but before her last day of work, sustained a significant low back injury. Post-injury, the employer offered her a different job that had substantially similar hours to the job she had quit. A complex procedural case, the court ultimately found that the correct rehabilitation plan was to return the employee to work in the same industry, but with a different employer. Her resignation from the job before her work injury did not preclude her from subsequent rehabilitation assistance.

In the analysis of what constitutes a reasonable post-injury job, the courts grant considerable deference to the employee's personal commitments, especially to the extent that they were present at the time of injury. Generally speaking, the courts will not require an employee to dramatically alter a reasonable and responsible pattern of living. However, an employee may not refuse a suitable job simply because she would prefer a different one. *Jones v. Hy-Vee Food Stores*, 1996.

**#8 Best practices**

A. Use common sense and good judgment when developing post-injury job offers.

- B. Minimize claim tensions by communicating job offers in a clear and courteous way.
- C. Make certain that physical requirements of post-injury work are consistent with restrictions.
- D. Monitor return to work and provide supportive oversight to supervisors and others in the department to ensure that the return to work is successful.





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INTERSECTION OF WORKERS' COMPENSATION WITH THE ADA AND FMLA***

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## **I. OVERVIEW OF THE ADA (AMERICANS WITH DISABILITIES ACT)**

The Americans With Disabilities Act (ADA) prohibits disability discrimination and requires employers to make reasonable accommodations in the workplace. The Act provides protection to a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of job. ADA considerations may arise during the healing period following a work injury, but in many cases it will be difficult to determine whether the employee's disability is of sufficient severity to implicate the ADA until a healing plateau has been reached, and final restrictions assigned.

Compliance with the ADA is required of all employers with 15 or more employees for each working day of 20 or more calendar weeks in the current or preceding calendar year. Covered employers under the ADA include private employers, state and local governments, employment agencies and labor unions. Certain corporations and entities are expressly excluded from compliance with the ADA's requirements for employers, including the 510(c) private membership clubs and Indian tribes. Keep in mind that state human rights acts may have broader coverage.

Permanent job modifications or accommodations may need to be considered at the time an employee is released to work with permanent restrictions, or even beforehand. An employer may need to perform an ADA reasonable accommodations analysis to evaluate this possibility. Sometimes a modification is as simple as providing an ergonomically-designed tool to assist with a certain task. Even if the employee is not technically a qualified employee with a disability under the ADA, an employer should not discount the possibility of minor job modifications to keep the employee on the job and, in the case of workers' compensation in particular, significantly minimize the potential exposure by doing so.

While not exhaustive, the following discussion highlights many of the provisions applicable to employers managing injured workers.

### **Disability**

The ADA Amendments Act of 2008 reinterpreted "disability" by rolling back the previous case law that more narrowly defined disability and limited eligibility for protection under the Act. Congress determined that the courts had improperly narrowed the scope of the Act and incorrectly found in many cases that individuals were not qualified individuals with a disability despite having a wide range of substantially limiting impairments. While the definitional language of disability did not change, how that language has been interpreted since the 2008 amendments has greatly expanded.

### **Substantial limitations**

If the disability or impairment *substantially limits* a *major life activity*, as determined by comparison to most people in the general population, an employee typically will qualify for protection under the ADA.

## **Major life activities**

"Major life activities" is defined, but not exhaustively so, through lists in the ADA. The "general" major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

In assessing whether a person is substantially limited in the activity of working, one should consider whether someone is substantially limited in performing a "class or broad range of jobs" as opposed to "type of work." "Class of jobs" may be determined by the nature of the work (e.g. commercial truck driving, assembly line jobs) or by looking at job-related requirements like duties of repetitive bending, reaching or frequent lifting. If an employee is only substantially limited in performing the duties of a particular, unique job, it is unlikely the EEOC would find her substantially limited in the major life activity of working.

The regulations also include a list of "major bodily functions" that qualify as major life activities: functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions.

## **Mitigating measures**

Determining whether a major life activity is substantially limited is not determined by taking into account the improvement or assistance obtained through mitigating measures, other than ordinary eyeglasses or contact lenses. An employer may not factor in items such as medication, prosthetics, mobility devices, assistive technology, reasonable accommodations, behavioral therapy, physical therapy and psychotherapy in evaluating a potential disability. Instead, determination of whether the employee is substantially limited under the ADA turns on whether the impairment substantially limits a major life activity without the mitigating measure. For example, if an employee suffered no impairment while medicated for epilepsy, but suffered frequent, disabling seizures if he went off his medications, the employer must focus on whether the employee is substantially impaired in his non-medicated state.

## **Episodic impairments**

A person is covered by the Act even if the impairment is in remission or only episodic in nature, so long as the impairment would substantially limit a major life activity when it was active. Examples of conditions that may invoke this aspect of the Act include epilepsy and cancer.

## **"Regarded as" disabled**

Even if an impairment would not otherwise qualify as a disability under the Act, because it does not substantially impair a major life activity, the employee may be protected by the Act if the employee was "regarded as" disabled because of an actual or perceived impairment. This concept of "regarded as" having a disability under the Act has broadened over the years; previously, the perceived impairment had to actually satisfy the requirements of a covered disability.

## **Transitory and minor impairments**

If the impairment is both minor and transitory in nature, with actual or expected duration of impairment six months or less, a person may not claim ADA protection for "being regarded as" disabled. Impairments must be *both* transitory *and* minor in order to be excluded from the "regarded as" prong of the disability definition.

### **Resources concerning the ADA and working with disabled employees:**

- Fact sheet on the ADA
  - <https://www.eeoc.gov/eeoc/publications/fs-ada.cfm>
- EEOC Resources on Disability Discrimination
  - <https://www.eeoc.gov/laws/types/disability.cfm>
- JAN–Job Accommodation Network
  - <http://askjan.org>

## **II. OVERVIEW OF THE FAMILY MEDICAL LEAVE ACT (FMLA)**

Eligible employees under the Family Medical Leave Act (FMLA) are entitled to take unpaid leave in connection with the birth of a child or the placement of an adopted or foster child, to care for a child, spouse or parent experiencing a serious health condition, or because the employee’s own serious health condition renders him or her unable to perform the job’s duties. The employer is required to post notices to workers regarding their rights under the FMLA, to provide FMLA information in a written handbook or similar document, and to give notice of the specific obligations of an employee when an FMLA leave begins. If an employee suffers from a "serious health condition," which is where the intersection with workers’ compensation arises, the FMLA provides various rights to that employee in terms of returning to work and accommodation in addition to leave requirements.

The FMLA is a job security law, providing 12 work weeks of unpaid leave per 12 every Generally speaking employers are covered by the Act if they have 50 or more employees, while employees are generally protected by the Act if they were employed for at least 12 months and worked at least 1,250 hours in the prior 12 months. During the FMLA leave period, group health benefits are maintained as if the employee were still working. Therefore, if the employee is required to contribute toward his health insurance premium, that contribution is still required even on leave, but the employer also continues to contribute their portion during leave, as well.

**Simultaneous receipt of Workers' Compensation benefits:** Employers may run FMLA leave concurrently with an employee’s workers’ compensation leave. If the employee is receiving workers’ compensation benefits while the employee is off work for an injury that qualifies as a “serious health condition,” the employer can elect to count the absence from work against the employee's entitlement to leave under the FMLA. The employer’s FMLA policy must provide for this option, and in order to count the periods of disability against the available FMLA leave, the employer must inform the employee that it intends to do so in accordance with the terms of the FMLA and the employer’s policy.

**Release to Work:** If the injured employee on FMLA leave receives a release to work from the doctor that is compatible with the pre-injury job duties, the FMLA requires that the employer must offer the employee the opportunity to return to his or her former position or another available employment position with equivalent pay and benefits.

**Light Duty:** Time performing light duty work is not counted against protected FMLA leave. Employees on FMLA are *not* required to accept light duty job offers. However, refusal of light duty may jeopardize receipt of workers' compensation benefits.

Other general FMLA provisions apply in the same manner to those employees on workers' compensation leave, as they do to others on personal leave:

- **Medical Certification:** An employer may directly contact the employee's health care provider in limited circumstances for purposes of authentication or clarification, and only after the employer has provided an opportunity for the employee to cure any deficiencies in the certification.

Once the employer has received a complete and sufficient certification, **the employer may not request additional information from the health care provider.** However, the employer may use a human resources professional, a leave administrator, another health care provider, or a management official to contact the health care provider to authenticate or to clarify the certification. For example, the employer's appropriate representative could ask the health care provider if the information contained on the form was completed or authorized by him or her, or ask questions to clarify the handwriting on the form or the meaning of a response. Under **no** circumstances may the employee's direct supervisor contact the employee's health care provider. U.S. Dept. of Labor, *Fact Sheet #28G: Certification of a Serious Health Condition under the Family and Medical Leave Act.*

- **Employee Notice:** Employees must advise employers in advance of FMLA leave absences and must follow an employer's call-in procedures to report such absences, unless impractical.
- **Employer Notice:** Employers must provide a notice of eligibility status, and a rights and responsibilities notice, within five business days of the request for leave.
- **Paid Leave:** An employee may take or be required to concurrently use any accrued paid leave, consistent with the employer's normal leave policy.
- **Intermittent Leave:** Employees must make a "reasonable effort" to schedule medical treatment and intermittent leave in a way that does not unduly disrupt the employer's business. Employers may temporarily transfer employees taking planned or pre-scheduled intermittent leave to an equivalent position. Intermittent leave may be recorded in the smallest time increments that an employer allows for other kinds of leave, but no greater than an hour.
- **Perfect Attendance Awards:** An employer is allowed to deny a "perfect attendance" award to an employee who has missed time from work due to FMLA-protected leave, so long as other employees taking non-FMLA-protected leave are treated in the same manner.

- **Fitness for Duty:** An employer may require a fitness-for-duty certification to address essential functions of the job, if the employee is notified of this requirement when given the designation notice.

The U.S. Department of Labor’s poster of employee rights and responsibilities under the FMLA is available at: <https://www.dol.gov/whd/regs/compliance/posters/fmla.htm>. For further information, fact sheets, and revised forms relating to the FMLA, the Department of Labor has devoted a section of their website to the subject at: <https://www.dol.gov/whd/fmla/>.

### **III. RETURN-TO-WORK POLICY AND PROCESS**

Early intervention and prompt return-to-work efforts following a disabling or potentially disabling event is critical. Having an effective return-to-work process is important to manage the exposure of a workers' compensation claim, but equally important in helping to manage potential FMLA and ADA risks and exposures.

A successful transitional or light duty return-to-work program is one of the best defenses an employer has against needless disablement from work. It provides an opportunity for the employee to recover on the job. Typically, a formal transitional work program limits the temporary light duty job assignment to a set period of time, e.g. 90 days or 6 months. The program has the goal of returning a disabled employee to work in their regular capacity no later than the end of the light duty job assignment. A **Sample Return to Work Policy** is provided in the materials at the end of this handout.

Permanent job modifications or accommodations may need to be considered at the time an employee is released to work with permanent restrictions, and possibly even before then depending on the nature and extent of the injury involved. An employer should not discount the possibility of minor job modifications to keep the employee on the job.

Enforcing a positive attitude toward light duty or transitional duty work is important. Respect for the program must come from the top down. Minimizing antagonistic attitudes in the return to work/stay at work process may assist in avoiding unnecessary litigation and expense.

#### **Practical Tips:**

1. Have a Written Policy
2. Identify Transitional Tasks and Duties (Rather than Jobs)
3. Have a defined time period or end date for light duty
4. Have Buy-In Throughout the Organization: Help supervisors see their role in the return-to-work process and actively support it for the injured worker as well as his or her co-workers.
5. Don’t Retaliate
6. CONSISTENCY!

A formal job offer letter should be sent to the employee’s residence. In the materials at the end of this handout, a **Sample Job Offer Letter** form is provided. When designing the transitional or light duty job offer, consider the employee’s restrictions and be creative. The job cannot be “fake” or menial, it must involve real work.

#### **IV. THE DANGER OF BRIGHT LINE STANDARDS: “FULL DUTY” REQUIREMENTS AND “BRIGHT LINE” POLICIES**

Employers who have return-to-work policies requiring employees at “full duty” or “restriction free” before returning to work from a disability or medical leave, should revisit those policies. Recent settlements resulting from suits brought by the EEOC against employers demonstrate the EEOC's intent to aggressively enforce the liberal intent of the ADA.

##### **“Full Duty” Return-to-Work Requirements**

Employers should not have a return to work policy requiring employees at “full duty” or “restriction free” before returning to work. A July 29, 2009 EEOC press release announced that food service company AVI Foodsystems, Inc. (AVI) was required to pay more than \$90,000 and offer jobs to discrimination victims to settle a class disability discrimination suit brought by the EEOC in Ohio.

The EEOC had charged in its suit that AVI violated the ADA by failing to allow employees with disabilities to return to work without a full-duty, no-restriction doctor's release. The agency said disabled employees who had been on leave and are able to return to work with some physical restrictions, but are still able to perform their jobs, should be allowed to do so. The policy had adversely affected more than 80 AVI employees.

In 2015, Tucson-based CTI, Inc., a trucking company, reached a \$300,000 settlement in a suit filed by the EEOC which alleged the trucking company requests for unpaid leave beyond the 12 week FMLA leave period and denied transfers into open positions for which disabled employees were qualified. In the case of one employee, CTI wrote the worker a letter advising her she needed to be released to "full, unrestricted duty" before the end of her FMLA leave in order to avoid potential termination of employment. Even when the employee asked additional leave for recovery time, her employer not only denied her request, but also refused to explore reasonable accommodations, and instead terminated her. The EEOC attorney in the CTI case was quoted:

"Employers should know they violate the law when they have blanket policies requiring disabled employees not to return to work until they are 100% healed. ... Such employers violate the ADA because they fail to conduct individualized assessments to explore reasonable accommodations that may allow disabled employees to return to work. Employers also violate the ADA when they have inflexible, rigid policies limiting unpaid leave to 12 weeks. Again, employers have an obligation beyond the FMLA to provide unpaid leave as a reasonable accommodation unless to do so would result in an undue hardship to the employer."

While an employer can require an employee to bring in a medical slip or prove that he or she is capable of physically performing the essential functions of the job, employees with some level of restrictions are often able to perform the necessary duties, even though they are not “restriction-free.” Employers should be careful in using terms such as “full duty” or “without restrictions” in defining when an employee is qualified to perform a job or return to work. Any policies concerning physical requirements for the job, or requirements for employees returning from medical or disability-related leaves, should be reviewed.

***Tips for Potential “Full Duty” Policies:***

- Avoid “full duty” and “restriction free” language in return to work policies and practices
- Remember: Physical restrictions do not necessarily disqualify an employee from the ability to perform the essential functions of the job
- Consider reasonable accommodations before declining to return an employee to work

**“Bright Line” Leave Policies**

One of the largest settlements in a single lawsuit under the ADA announced by the EEOC involved Sears Roebuck & Company, in a suit alleging that it violated the ADA by terminating employees at the end of an inflexible workers' compensation leave policy. A Sears's employee had filed a charge of discrimination after Sears terminated him at the end of his workers' compensation leave. The employee continued to experience disability from his work-related injuries, but alleged he had repeatedly tried to return to work at Sears and Sears never provided any reasonable accommodations to facilitate his return.

When the EEOC conducted its investigation, it found more than a hundred other employees terminated in similar circumstances. The EEOC claimed that Sears terminated employees on workers' compensation leave without considering reasonable accommodations or reasonable extensions of their leaves. The press release issued by the EEOC on September 29, 2009, following the Sears settlement reveals the agency's attitude toward "bright line" leave policies: **"[I]nflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law."**

In addition to significant equitable relief and a three-year monitoring or injunctive period, Sears was required to pay \$6.2 million in settlement, which was the largest monetary recovery in a settlement of a single ADA lawsuit in EEOC history at that time.

The EEOC's interest in cracking down on these “bright line” leave policies was again reinforced in the United Road Towing, Inc. settlement. On June 25, 2012, the EEOC announced a settlement with the Illinois towing company. The \$380,000.00 settlement for the 13 claimants resolved the EEOC's disability discrimination lawsuit against the towing company, in which the EEOC alleged that the towing company had failed to provide reasonable accommodation to employees taking medical leave to help facilitate their return to work. Instead, the EEOC alleged that the towing company terminated those employees at the end of their leave.

Returning injured workers to work as quickly as possible following a work injury not only decreases the future exposure of the claim, but also helps to protect an employer from potential disability discrimination suits. Early and flexible return to work options, such as modified or light duty programs, also benefits both the employees and employers by getting employees back to a productive status sooner rather than later.

***Tips for Potential “Bright Line” Policies:***

- Examine reasonable accommodations before terminating employment
- Extension of leave may be an accommodation to consider
- Be wary of “inflexible” form letters
- Avoid “100% healed” requirements



## SAMPLE RETURN-TO-WORK PROGRAM

(Your organization’s name) \_\_\_\_\_ supports the practice of bringing injured employees back to work, as soon as they are medically able, to a position in our organization compatible with any physical restrictions they may have. We believe this practice serves the best interests of our employees and organization.

The prompt return of injured employees to positions within their medical restrictions will minimize the impact of work-related injuries. Coming back to work early helps employees remain functional as they recover while providing our organization with the valuable use of employees’ talents. It also helps control workers’ compensation costs.

If you are injured at work, report the injury to your supervisor immediately -- no matter how minor the injury is. Your supervisor will report it to our organization’s workers’ compensation claims coordinator within 24 hours. Any questions concerning workers’ compensation should be directed to this individual.

**Claims coordinator** \_\_\_\_\_ **Phone** \_\_\_\_\_

Your supervisor and/or claims coordinator will help arrange for medical treatment following an injury. Prompt, quality medical treatment can be assured through the use of our primary care clinic.

**Clinic** \_\_\_\_\_ **Phone** \_\_\_\_\_

Current positions may be modified to fit the medical limitations of injured employees by modifying workstations, altering specific tasks or working reduced hours. If this is not possible, temporary transitional jobs may be made available either with your department or through a temporary assignment with another department.

Examples of these transitional jobs or tasks include:

\_\_\_\_\_

This return-to-work program is an important part of our organization’s commitment to manage work-related injuries in a way that’s best for our employees and for this organization.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date



***SAMPLE JOB OFFER LETTER***

«Date»

«Employee's Name»

Sent by certified mail

«AddressBlock»

«AddressBlock»

Dear «Employee's Name»:

I am pleased to hear of your ongoing recovery from your work-related injury. «Company Name» looks forward to your successful return to work.

I would like to offer you this transitional employment position that meets the medical restrictions outlined by your physician in the enclosed medical report. The «Job Title» position is a «Choose between part-time or full-time» position. You will be working «Choose weekday through weekday», from «Choose starting time» a.m. to «Choose ending time» p.m. You will be compensated at \$«Dollar amount» /hr, and will continue to be eligible for «List any other company benefits». A copy of the job description further outlining the duties of the position is enclosed.

This job offer is dependent upon your ability to show your eligibility to work in the United States.

Please contact me with your acceptance or denial of this offer by «Date». Your first day of work in your new position will be «Weekday, Month, Date, Year». Please contact me if you have questions about this job offer. I look forward to hearing from you.

Sincerely,

«Claim Coordinator»

«Claim Coordinator's Title»

«Company Name»

«Telephone Number»

«Email Address»

Enclosures: Job description and physician's work restrictions

cc: «Claims Representative»