

**IBEW  
SYSTEM COUNCIL #2  
2017 QUADRENNIAL CONVENTION**

**Introduction to:**

**The Federal Employers Liability Act  
&  
The Federal Whistleblower Law**

**Presentation by DLC  
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# Legal Services of DLC

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- **FELA – Federal Employer’s Liability Act**
- **FRSA – Whistleblower**
- **Off Track Vehicle Injuries**
- **EEOC & ADA – Employment Discrimination**
- **RLA – Railway Labor Act (with the IBEW)**
- **Non Railroad injuries – Automobile Accidents, and other Personal Injuries**
- **Assisting Local Chairmen with Investigations**
- **ARLA – your best legal friends in DC!**

# Federal Employer's Liability Act

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Enacted by congress in 1906 & 1908, the FELA exempts the railroads from having to answer to any State Worker's Compensation Program. Instead the rights of injured railroad workers is **EXCLUSIVELY GOVERNED** by the FELA

# Federal Employer's Liability Act

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## FELA – Key Features

- **Liability = Railroad responsibility.** MUST establish liability before any recovery. Liability can be established two ways.
  1. FELA Negligence;
  2. FELA Strict Liability
- **Causation.** MUST show #1 or #2 caused harm
- **Damages.** IF you establish liability caused harm, then entitled to common law damages





# Federal Employer's Liability Act

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## FELA Negligence - **Definition**

- Can be active or passive: “Negligence is the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation...(or fails to do that which a reasonably careful person would do)” CACI 401
- Note: “Person” can be any railroad employee

# Federal Employer's Liability Act

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## FELA Negligence - DUTY

- Railroad has **NON-Delegable** duty to:
  1. Provide a reasonably **safe place to work**;
  2. Reasonably **safe/suitable tools/machinery**;
  3. Perform reasonable **inspections**;
  4. Institute and oversee reasonably safe **methods and procedures** to perform work
  5. Not to assign employee to task for which he is **unfit**
  6. Failure to assign **sufficient number** of employees to task









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# Federal Employer's Liability Act

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## FELA Negligence – **Comparative fault**

“If defendant railroad proves 1, that plaintiff railroad employee was negligent, and 2, that plaintiff employee’s negligence was a cause of his/her harm, then **plaintiff employee’s damages are reduced** by the jury’s determination of the **percentage of plaintiff employee’s responsibility.**”

CACI 2904

# Federal Employer's Liability Act

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## FELA STRICT LIABILITY – Definition

“Defendant railroad is responsible for harm caused by *a violation of a statute enacted for the safety of employees* even if it was **not negligent**. If you find that defendant railroad is responsible for plaintiff employee's harm, plaintiff's recovery, if any, **must not be reduced** because of plaintiff's own conduct.” CACI 2920



# Federal Employer's Liability Act

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## FELA STRICT LIABILITY – Examples

- **LIA – Federal Locomotive Inspection Act** – Locomotive and its parts and appurtenances must be “in proper condition and safe to operate without unnecessary danger of personal injury.” 49 USC § 20701
- **FSAA – Federal Safety Appliance Act** – sill steps, ladders, cross-over platforms, grab irons, handbrakes, air brakes, couplers, air hoses, etc 49 USC § 20302(a)



# Federal Employer's Liability Act

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## FELA STRICT LIABILITY – Examples

- **FRSA – Federal Railroad Safety Act** – the FRSA includes many provisions for the safety of railroad workers, including: Utility Employees, Radio Communication Rules, Rear End Marking Devices, Hours of Service, Track Standards, Noise Emission, ETDs, etc. 49 USC §§ 20101 *et seq* 49 CFR §§ 213 *et seq*
- **State Walkway Standards** – CPUC GO 118 & 26D



# Federal Employer's Liability Act

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## FELA NEGLIGENCE AND STRICT LIABILITY

### Definition of **CAUSATION**

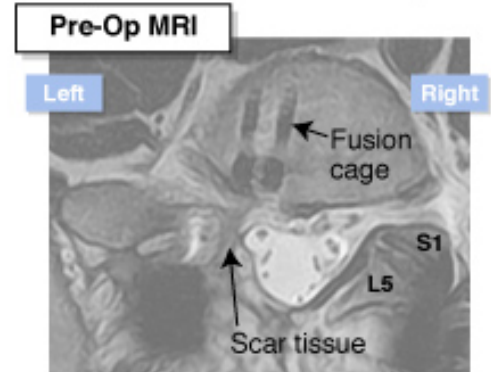
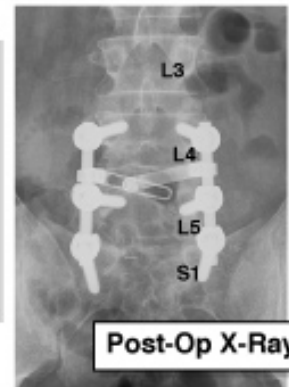
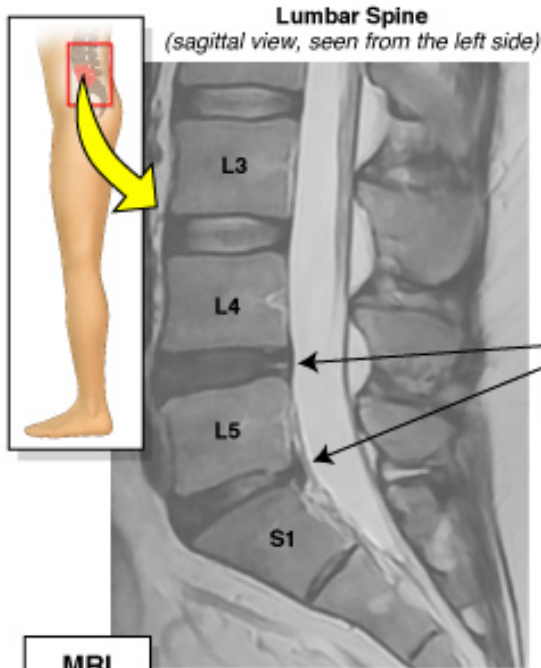
“Defendant’s negligence/violation of safety act, if any, was a cause of plaintiff’s harm/death if it played **any part, no matter how small**, in bringing about the harm/death, even if other factors also contributed to the harm/death.” CACI 2903

# Injury to Lumbar Spine & Surgeries, Jerrod Gunter

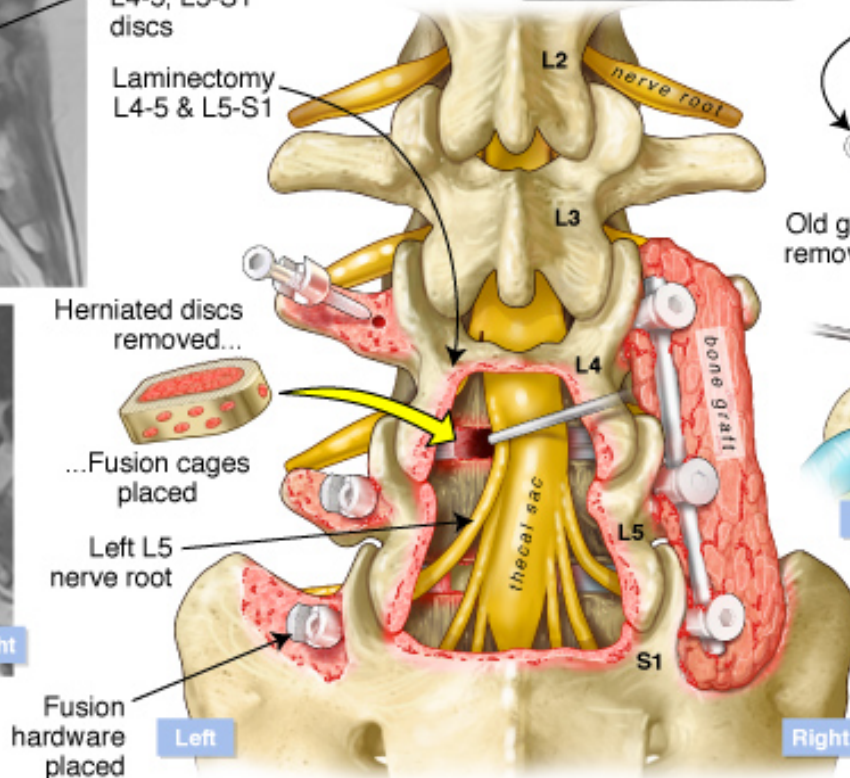
## Pre-Op Condition

## 5-16-11 Decompression & Fusion Surgery

## 9-24-12 Surgery



L5-S1 (seen from above)

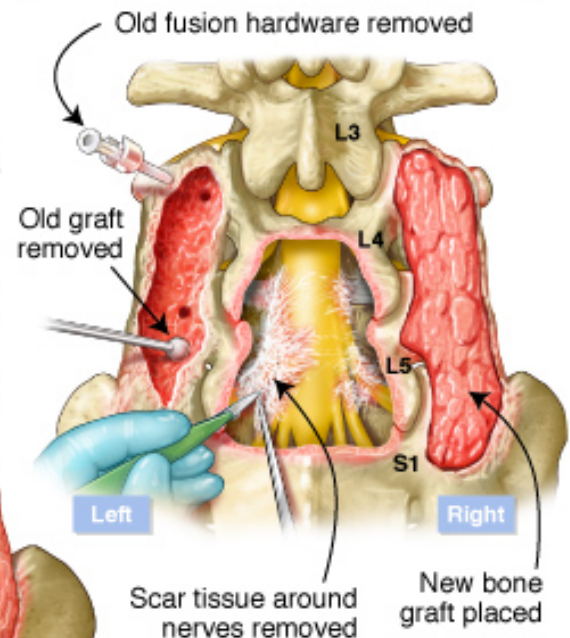


Herniated discs removed...

...Fusion cages placed

Left L5 nerve root

Fusion hardware placed



# Federal Employer's Liability Act

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## FELA NEGLIGENCE AND STRICT LIABILITY – ELEMENTS OF DAMAGES

1. Past Lost Earnings (after tax)
2. Future Lost Earnings & Capacity (after tax)
3. Unpaid past and future Medical Bills
4. Past physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress.
5. Future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress.
6. Lost Ability to Provide Household Services



# Federal Employer's Liability Act

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## FELA ELEMENTS OF DAMAGES (cont.)

Under the provision of the FELA, potential damages do **NOT** include:

- Punitive Damages
- Loss of Consortium (effect of injury on spouse)

# Federal Employer's Liability Act

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## DUTIES OF LEGISLATIVE REPRESENTATIVES

- Gather Safety Concerns from **educated** members
- **Document, Document, Document** concerns
- **COMMUNICATE SAFETY CONCERN TO CARRIER!!!**
- Know FEOLA need for evidence – NOTICE!
- Gather and preserve post accident evidence
- Know /teach Section 60 Rights – Provides broad protection to any person voluntarily providing information to injured employee or their representative!

# FRSA Whistleblower

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- **What is a “Whistleblower violation”?**
  - Definition
  - Examples
  - Medical treatment
- **How to protect yourself**
- **Filing complaints**
- **Recent cases**
- **Questions**



# What is a “Whistleblower violation”?

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- Under 49 U.S.C. Section 20109:
- Railroad commits a violation when it undertakes an **adverse action**, due, **in whole or in part**, to employee’s **protected activity**



# What is a “Whistleblower violation”?

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## Required Elements

1. Protected Activity by Employee
2. Adverse Action by RR
3. Connection between (1) and (2)

# What is a “Whistleblower violation”?

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## Common Protected Activities

- Notifying RR of **work-related injury**
- Reporting **hazardous** safety / security **condition**
- Accurately reporting **hours of service**
- Filing / assisting with **OSHA complaint**
- Asking for **medical treatment** of on-duty **injury**

(Note: OSHA will not investigate a § (c)(1) complaint, but will refer to FRA or local OSHA office for “possible inspection”. Employee will have appeal rights per the Act.)



# What is a “Whistleblower violation”?

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## Common Protected Activities, cont'd

- Notifying RR of **work-related injury**
- Can be
  - ✓ Verbal OR
  - ✓ Written



# What is a “Whistleblower violation”?

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## Common Adverse Actions

- Intimidation
- Threats
- Harassment
- Discipline
- Termination
- Probation or adverse “points”



# What is a “Whistleblower violation”?

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## Connection between (1) and (2)

- KEY!!
- The RR’s adverse action must have been done in whole or in part because of the employee’s protected activities





# What is a “Whistleblower violation”?

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## Possible Examples:

- Discipline for late reporting an injury
- Threatening discipline / termination if an injury is reported
- Termination / retaliation for filing an OSHA complaint

# What is a “Whistleblower violation”?

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- **Medical Treatment**

- Requesting medical treatment is a protected activity
- The RR cannot **delay, deny, or interfere** with medical treatment of on-duty injury
- The RR cannot **discipline** an employee for requesting medical treatment or following Dr.’s treatment plan

- **Examples**

- RR requiring employee to speak with nurse / manager before getting treatment
- RR requiring reenactment/paperwork before getting treatment
- Disciplining employee for going to Doctor

# FRSA Whistleblower

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## How to Protect Yourself:

1. Ask questions
2. Make request for medical treatment
3. Keep notes
4. 180 days



# FRSA Whistleblower

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## Ask Questions!!

- Union reps
- Co-workers
- Attorneys and investigators at Hildebrand, McLeod & Nelson or other DLC/ARLA counsel.



# FRSA Whistleblower

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## Explicitly Request Medical Treatment

- Maximum protection is if you **request hospital/ER**
- RR **must promptly** arrange transport to **nearest hospital**



# FRSA Whistleblower

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## Keep Notes:

- The more detail, the better
- Key events
- Conversations
- Times & dates
- Witnesses



# FRSA Whistleblower

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## Statute of Limitations: Strict Filing Deadline

**180 days:**

- SHORT TIME LIMIT!!
- Must file complaint within 180 days from adverse action
- Not exactly 6 months





# FRSA Whistleblower

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- **Complaints are filed through Federal OSHA**
- **Region 9 & 10**
  - **San Francisco Regional Office: (415) 625-2527**
    - Region 9: California, Nevada, Arizona
  - **Seattle Regional Office: (206) 757-6700**
    - Region 10: Washington, Oregon, Idaho
- **Who can file**
  - **Employees – Union Reps - Attorneys**

# FRSA Whistleblower

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## Why file?

- Punitive damages up to \$250,000
- Back pay & other economic damages
- Emotional damages
- Reinstatement, discipline expungement
- Attorneys fees

# FRSA Whistleblower - Process

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- OSHA Complaint & Investigation\*
- OSHA Merit Finding or Dismissal
- Appeal to Administrative Law Judge\* (automatic right)
- Appeal to Administrative Review Board (discretionary)
- Appeal to Federal Circuit Court of Appeals (discretionary)



\*NOTE: after 210 days with OSHA, can file in Federal trial court; appeal to Federal Circuit Court of Appeals

# FRSA Whistleblower

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## Recent Case: Harvey v. UP

### 1. What happened:

- Harvey injured from slipping on water from defective locomotive ice box

### 2. Protected activities:

- Notified UPRR of on-duty injury two months later
- Requested medical treatment

### 3. Adverse actions:

- RR told Harvey he would be investigated
- Termination for late reporting



# FRSA Whistleblower

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## Recent Case - Harvey v. UP

### Violations of 20109(a)(4) and (c)(2) based on:

- On day of injury report, RR told Harvey of Level 5 charges & investigation
- Time proximity between termination and report
- RR manager became angry at Harvey when injury reported
- Disparate treatment between Harvey and conductor
- Incomplete investigation by RR
- Charges disproved by investigation testimony

# FRSA Whistleblower

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Recent Case: Harvey v. UP

## OSHA Order:

- \$75,000 for pain and suffering
- \$150,000 in punitive damages
- Expunge adverse reference from personnel records relating to suspension
- Attorney fees

# FRSA Whistleblower

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## FIRST EVER WHISTLEBLOWER JURY TRIAL – Barati v. Metro North

### 1. What happened:

- Claimant hurt toe using the method taught by the RR

### 2. Protected Activities:

- Notified RR of an on-duty injury that day

### 3. Adverse Actions:

- Terminated for not following RR safety rules (Rules are contrary to what RR taught him)

# FRSA Whistleblower

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Barati v. Metro North (con't)

**Violations of 20109(a)(4) because:**

- Time proximity between termination and injury notification
- Termination was disproportionate to violation
  - Clean discipline record
  - Testified he was not taught method in safety rules
- Testimony of RR managers established RR discriminated



# FRSA Whistleblower

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Jury Verdict: Barati v. Metro North:

- \$40,000 **emotional distress**
- \$1,400 **lost wages** for attending trial
- \$1,000,000 in **punitive damages** (reduced to \$250,000)

# Other Notable Developments

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- Bala v. Path – 20109(c)(2) protects following doctor's orders for **on ~~and off~~ duty** medical conditions
- Reed v. NS – **No “election of remedies” defense** between FRSA and RLA PLB process (7<sup>th</sup> Cir.)
- April 2014 OSHA decision – UP ordered to pay \$85,000 for its retaliation against employee who reported injury and defective seat

# FRSA Whistleblower

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## Whistleblower in the Future – A New Law

- This is a VERY new law, it's still developing
- Not all questions for all situations are answered



# FRSA Whistleblower

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1. If you are hurt, request hospital / ER
2. Have a witness / buddy
3. 180 days to file
4. Ask questions
  - Union reps



# Contact Us

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**If you or your member have questions or claims, contact  
the  
Attorneys and investigators  
of those law firms who have dedicated their life's work to  
representing the best interests of rail labor and who are  
willing to fight with you to, and through, trial.**

**1-800-447-7500**

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