



# FMLA: What You Need to Know

New Regulations, New Trends and More!



- HR Benefits
- HR Management
- HR Services

We're proud to offer a full-circle solution to your HR needs. BASIC offers collaboration, flexibility, stability, security, quality service and an experienced staff to meet your integrated HR, FMLA and Payroll needs.



**Joe Aitchison, SPHR, BASIC Vice President.**

Joe provides Business & HR client advisory services and HR out-source services nationally. He is a Human Resource professional with over twenty five years business management and HR consulting experience. He has worked with multi plant International Tier I Automotive Manufacturing, retail, food processing, health care, legal administration and professional services.

Mr. Aitchison is recognized as a leader in human resources and has obtained a lifetime certification as a senior professional in human resource management and has helped develop and oversees BASIC's FMLA outsource services.

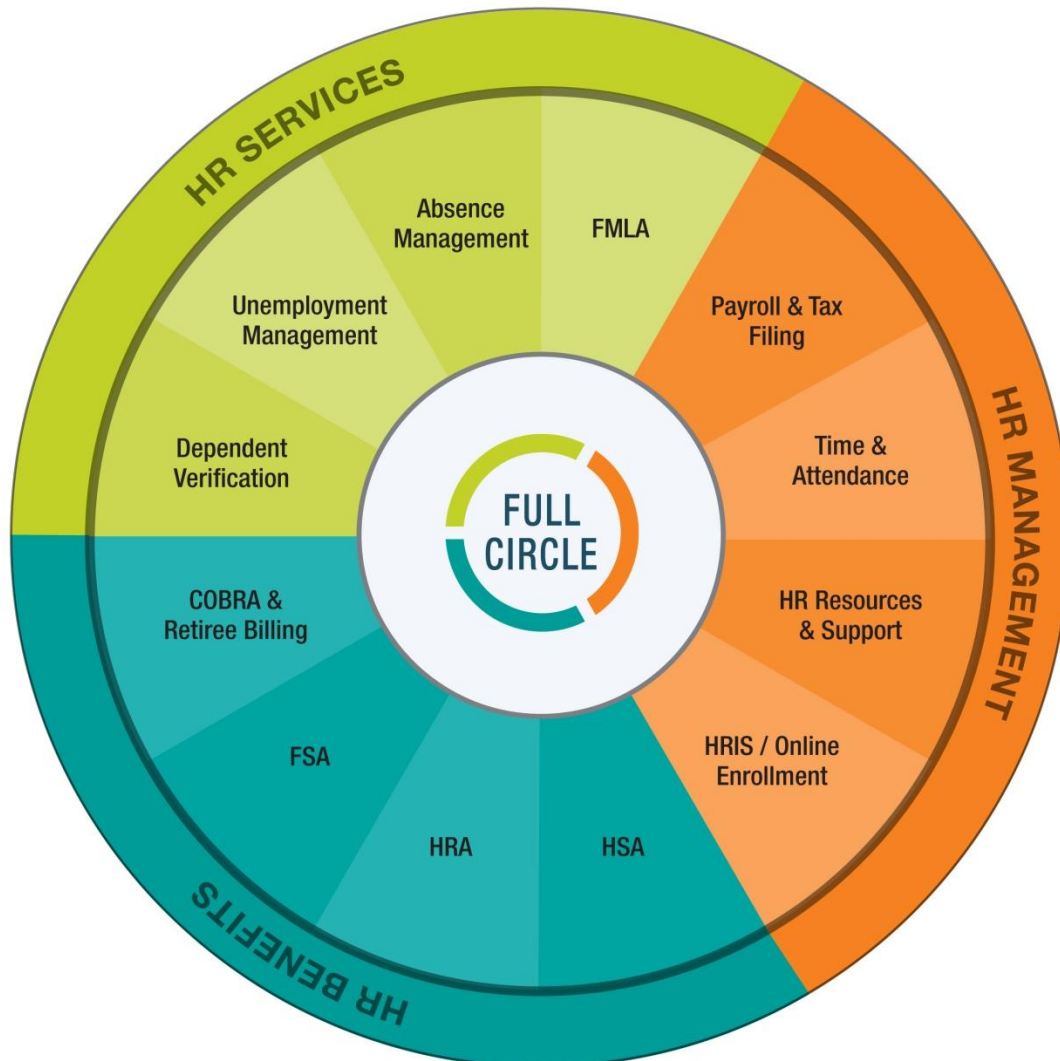


**Chris Stoddard, BASIC FMLA Specialist.**

Chris has worked in a variety of facets at BASIC. Our clients and partnering health insurance agents have come to rely on Chris' knowledge and expertise with Human Resources and Payroll & Tax compliance. Chris has a much broader reach and appeal now as the administrator for BASIC's LinkedIn FMLA Group, an open forum for HR Professionals to seek opinions and share experiences.

Mr. Stoddard helps BASIC FMLA clients develop, implement and maintain human resource strategies that effectively enhance the organization's mission.

# HR Solutions Come Full Circle



HR solutions should be simple.  
**Keep it BASIC.**

BASIC's integrated HR solutions come full circle for employers nationwide. Consistently recognized as an Inc. 5,000 Fastest Growing Private Company, our expertise allows you to control costs, manage risks and improve staff focus and effectiveness.

# FMLA: 101



# What is FMLA?



- Family and Medical Leave Act (FMLA)
  - Enacted into law in 1998
  - Updated in 2009, 2010, and 2013
- Family and Medical Leave
  - Bonding
  - Serious health condition for spouse, child, or parent
  - Own serious health condition
- 12 weeks of protected leave for eligible employee
  - Provides benefit protection
  - Guarantee reinstatement to same or similar position



# FMLA applies to...?



- Covered employers
  - 50 employees or more for 20 weeks of the year
- Worksites
  - Where do assignments come from?
  - Where do you report too?
- Employees
  - 1,250 hours
  - 12 months of service



# Family Definitions



- **Spouse:** A husband or wife as defined or recognized by state law for purposes of marriage.
- **Parent:** Includes a birth parent and adoptive, step or foster parent or a person who has stood in as a parent for a child under eighteen or if the child is eighteen or older and incapable of self-care because of a mental or physical disability at the time the leave is to start (“in loco parentis”). This definition does not include “in-laws”.
- **Child:** A biological, adopted or foster child, a stepchild, a legal ward or a child of an employee who has all of the rights and responsibilities of a parent to that child, provided that the child is either under the age of 18 or age 18 or older and incapable of self care because of a mental or physical disability. However, in the case of Military Exigency Leave and Military Medical Leave, the definition includes a child of any age.





# Certification Process



- Notices
  - Rights and Responsibility (WH-381)
  - Designation Notice (WH-382)
- Medical Reason
  - Medical Certification (380-E or 380-F)
- Bonding Leave
  - Birth certificate
  - Court order
  - Adoption papers

# Certification Process



- **Military**
  - Qualifying Exigency Form (WH-384)
  - Serious Injury or Illness Covered Service Member (WH-385)

# Serious Health Conditions



- “illness, injury, impairment or physical or mental condition that involves inpatient care as defined in 825.114 or continuing treatment”
  - ***Incapcity***: “inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom”
  - ***Treatment***: Includes (but not limited too) examinations to determine SHC, prescription medication, and therapy

# Clarification and Authentication



- the employer may contact the health care provider for purposes of clarification and authentication of the medical certification
- employer must use a health care provider, a human resources professional, a leave administrator, or a management official
- *Clarification*: understand the meaning of the response or illegible handwriting
- *Authentication*: verify that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document

# 2<sup>nd</sup> and 3<sup>rd</sup> Opinion



- Employers allowed to contest certifications
  - **2<sup>nd</sup> Opinion:** Employer chooses the healthcare provider (HCP) and pays for exam
  - **3<sup>rd</sup> Opinion:** Mutual decision on the HCP and the employer pays for exam. Final and Binding
  - **“Best 2 out of 3”:** If 2<sup>nd</sup> opinion is different than the original certification the employer must require a 3<sup>rd</sup> opinion



# Types of Leave



- Continuous Leave
  - **one** block of time due to a single qualifying reason
- Intermittent Leave
  - taken in **separate** blocks of time due to a single qualifying reason
- Reduced Leave Schedule
  - leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday



# Job Reinstatement



- Qualified employees keep same or equivalent job
- May deny reinstatement if employees:
  - Would not have remained employed
  - Announce intent not to return
  - Have taken leave fraudulently
  - Violated policy
  - No longer qualified to perform the job
  - Is a “*key employee*”

# New Regulations





# Happy Anniversary



- February 5, 2013 – 20 years of FMLA
- Announced new regulations for Military leave and Airline Crews



# Exigency Leave



- Now includes all active members of the armed services
  - Must be deployed to a foreign country
- Parental Leave
  - Care for a military member's parent who is incapable of self-care



# Exigency Leave (cont.)



- R&R
  - Expanded from 5 leave days to 15 calendar days
  - Employee must provide documentation from the military supporting R&R order

# Caregiver Leave



- Veterans are covered for up to five years after discharge
  - Discharge can be any reason other than dishonorable
- Healthcare providers, as defined in 825.125, can now certify caregiver leave
  - 2<sup>nd</sup> and 3<sup>rd</sup> opinion can be requested only when certified by HCP as defined in 825.125



# Genetic Information



- New regulations now include wording to incorporate Genetic Information Non-Discrimination Act (GINA)
  - What is GINA:
    - Prevents discrimination by the employer based on genetic information (results of genetic testing and family history)

# Employee Eligibility



- Any work time missed due to USERRA-covered service is counted toward the 1,250 hour/12 month service rule

**Example:** If the employee is unable to work his or her schedule over the weekend because the monthly reserve requirement then that time missed would be counted toward eligibility requirements

# Language clarification



- The new rules added clarifying language but it did not change the intent of the rule
  - Minimum Increments of Leave: smallest increment of time used in other forms of leave
  - Physical Impossibility: “impossibility provision” used in the most limited circumstances



# Flight Crews



- **Special hours of service eligibility requirement.** Airline flight crew employees will meet the hours of service eligibility requirement if they have worked or been paid for not less than 60 percent of the applicable total monthly guarantee and have worked or been paid for not less than 504 hours during the 12 months prior to their leave.
- **Special method of calculation of leave.** An eligible airline flight crew employee is entitled to 72 days of leave during any 12-month period for FMLA-qualifying reasons other than military caregiver leave and 156 days of leave during a single 12-month period for military caregiver leave. The Final Rule also provides that, if an airline flight crew employee takes leave intermittently or on a reduced schedule, the employer must account for the leave using an increment no greater than one day.





# Flight Crews (cont.)



- **Recordkeeping requirements.** The Final Rule requires that, in addition to generally applicable FMLA recordkeeping requirements, covered employers of airline flight crew employees must maintain records or documents containing the applicable monthly guarantee for each category of employee to whom the guarantee applies, including copies of any relevant collective bargaining agreements or employer policy documents. Covered employers of airline flight crew employees must also maintain records of the airline flight crew employees' hours worked and hours paid.



# Top 10 Mistakes



## 10. Aggressive certification



- Failure to handle questions about validity of a medical certification according to regulations
  - Asking for more information than required?
  - Are direct managers validating certifications?
  - “An ounce of prevention is worth a pound of cure”
    - Training is important



# 9. Notification Process



- Request medical certification in writing
  - Part of the rights and responsibility notice
  - “I didn’t know I was suppose to turn that back in to you”

## 8. Assumptions



- Failure to grant FMLA based on misunderstanding of what qualifies as a serious health condition
  - Chronic condition
  - Condition requiring inpatient care
  - Condition requiring ongoing treatment
  - **Two minor conditions but directly related**



# 7. Terminating



- Terminating an employee during leave or following leave
  - Reinstatement can be denied
  - Have clear reason why you are terminating
  - DO NOT include FMLA in your evaluations
  - Is additional time a reasonable accommodation?



Your Fired! Now I hope I don't get sued.

## 6. Same or Equivalent Job



- Failure to reinstate employee to the same or equivalent job
  - Changes to work location may be considered retaliation
  - Shift changes
  - Job responsibly changed
  - Make sure good business reason exist for change

## 5. Denying Leave for Parents



- Failure of granting leave for physical or psychological comfort for a parent
  - Understand the role of the employee in providing comfort
  - Employee does not have to be only person
  - Understand “*in loco parentis*”



## 4. Disciplining Employee



- Taking disciplinary action because employee took FMLA
  - Adjust job performance goals
  - Retaliatory action?



# 3. Absentee Policy



- Counting FMLA against a company's absentee policy
  - Not designating FMLA when it should be
  - Employers responsibility to understand when FMLA applies

## 2. FMLA usage



- Failure to notify employee that time was used toward 12 week entitlement
  - Who is accountable for the balance awareness?
    - Out of time notice
    - If you do not notify employee that 12 weeks has been used and you terminate the employee for not returning to work; you probably will lose a retaliation lawsuit (Young v. Wackenhunt Corporation)



# 1. Notification process



- Failure to notify the employee of rights and responsibility
  - Even if you were right to deny FMLA the DOL can levy a fine for not following the proper notice procedure
  - Are your policies sufficient or up to date?
  - Are your posters available for viewing?
  - How was I suppose to know?



# The Future of FMLA



Developing Trends, Pending  
Legislation, and More!



Social Leave

# Pending Legislation



- Healthy Families Act (3%)
  - Sick leave
- Part-Time Worker Bill of Rights Act (0%)
  - Extend FMLA to part time employees
- Parental Bereavement Act (0%)
  - Extend FMLA
- Military Leave Act (4%)
  - Two weeks of FMLA for families
  - 25 cosponsors (bipartisan)





- Paid Leave
  - State leave programs
- Local restrictions on mandatory paid/unpaid sick leave
- Best guess, look for more Fed/State activity closer to major election

# Future of FMLA



- February 5<sup>th</sup> press conference was revealing:
  - Paid FMLA (see Connecticut)?
  - Lowering eligibility requirements?
  - Lowering requirements to be “covered employer”
  - <http://www.dol.gov/dol/media/webcast/20130205-fmla/>
- FMLA benefits for same sex marriages?
  - Constitutionality of the DOMA before SCOTUS







- Social Media (two court cases)
  - Employees posted pictures on Facebook
  - Coworkers complained
  - Management investigated
  - Terminated Employees
- ADA enforcement
  - FMLA ends after 12 weeks but EEOC is taking that the stance that additional time is a job accommodation





- Intermittent leave on a 1 to 5 day occurrence up to 4 weeks a month. What do you do?
  - Intermittent leave is not a right under FMLA
  - Employees are entitled to 12 weeks of work
- When do you determine when employee is exceeding frequency and duration?

# DOL thinks FMLA is Easy



- DOL released a survey to celebrate 20 years
  - 85% of employers report FMLA is Very Easy or somewhat easy
  - 24% of FMLA leave is intermittent
  - Fewer than 2% of worksites reported misuse
  - Fewer than 3% of worksites suspected misuse

Take Away: Unfortunately you do not see the questions used in the survey. It is our belief that these results do not represent the current state of FMLA.

# FMLA without the spin



- BASIC polled 150 employers
  - 32% had 50 to 250 employees, 20% 1,000 to 5,000
  - Usage: 36% reported 1% to 5%, 19% reported 6% to 10%
  - On a scale of 1 (Very easy) to 10, how hard is it to Administer FMLA? Average 5.4
  - On a scale of 1 (no disturbance) to 10 how much of a disturbance does FMLA cause on business? Avg 5.7

**Take Away:** BASIC's results do not match the assessment of the DOL survey on the current state of FMLA. With the amount of law suites it is our belief that FMLA is not as easy as the DOL portrays.



# Best Practices



- Review policies and procedures
- Consistency, consistency, and more consistency!
- How do you handle accusations of FMLA abuse?
- Have a training program every six months on FMLA.



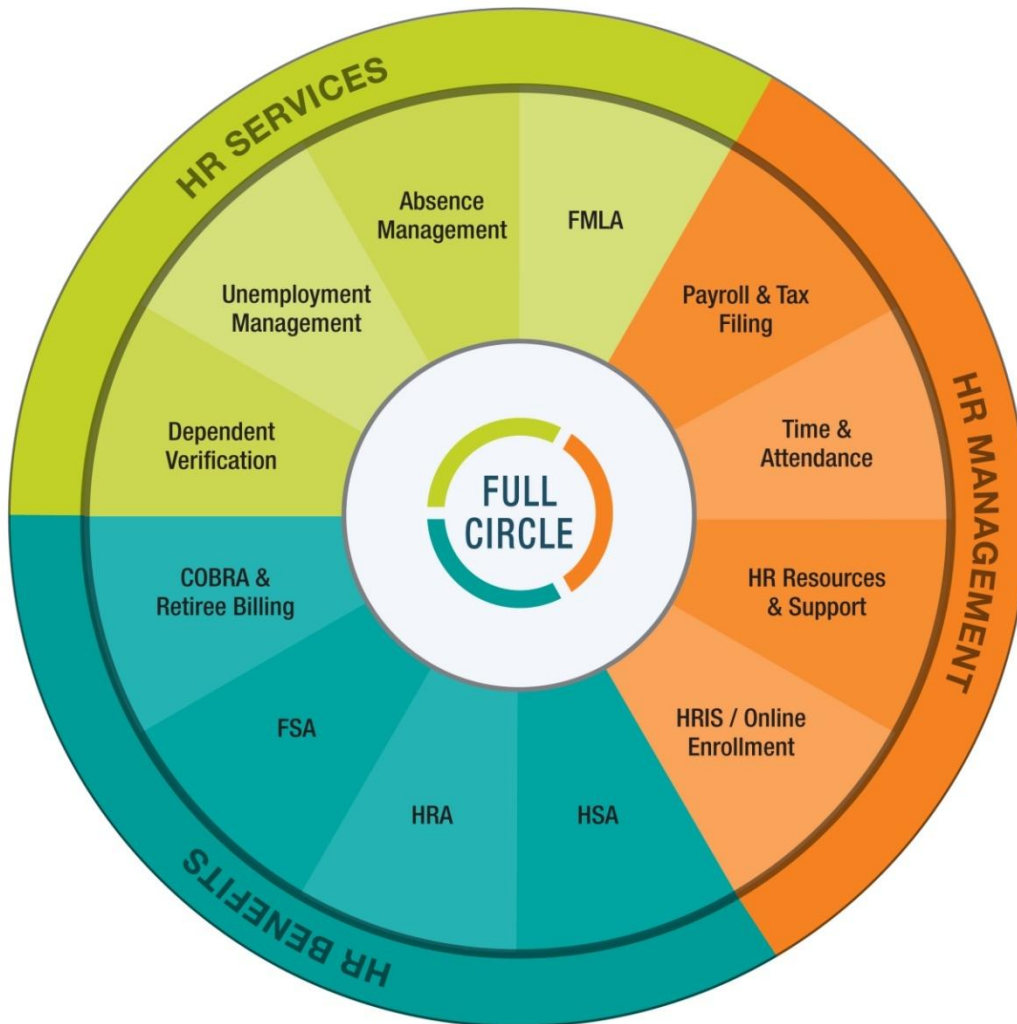
# Questions



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# Contact Us



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800.444.1922  
sales@basiconline.com