



FMLA Review

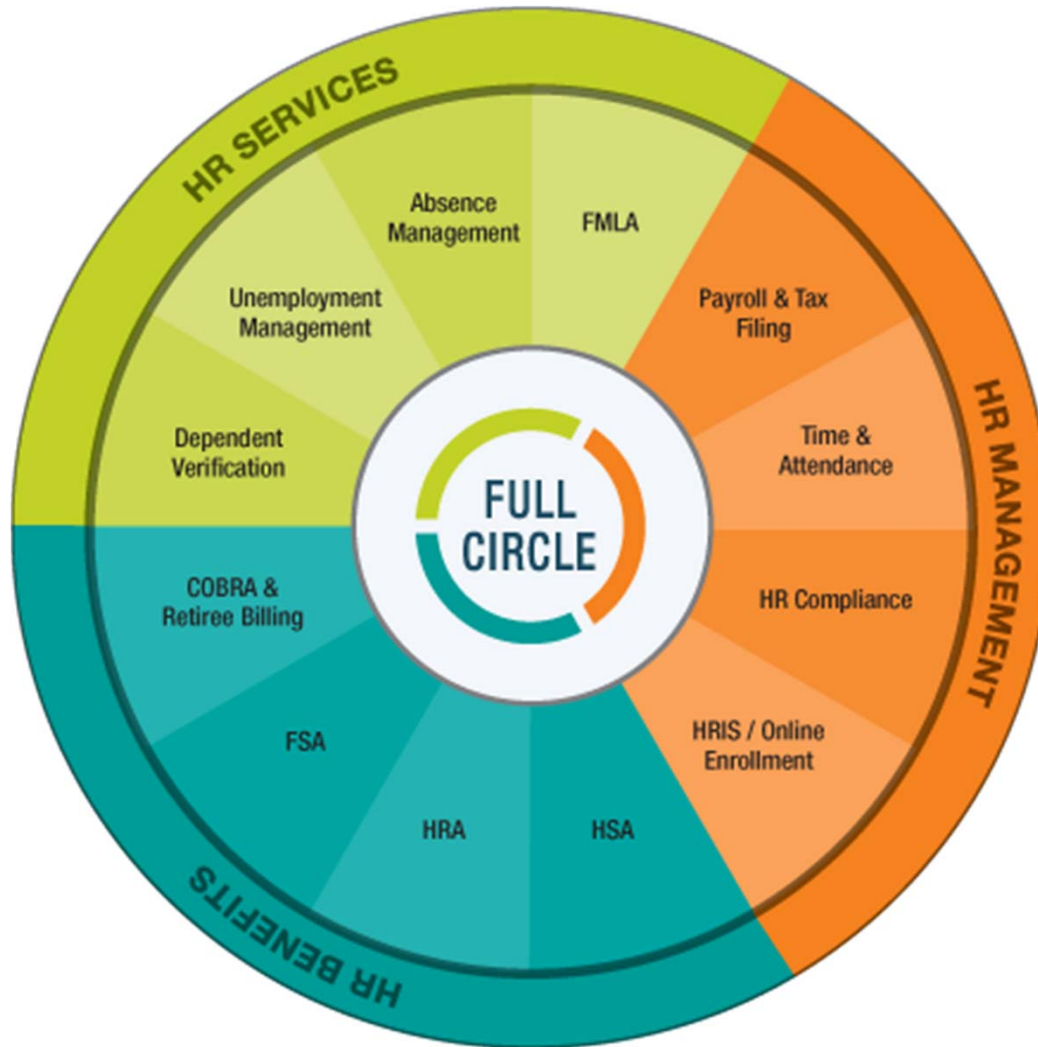
Presented by: Joe Aitchison & Chris Stoddard



- 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.

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.



Meet Your Presenter



Joe Aitchison, SPHR Vice President of BASIC

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 oversee BASIC's FMLA outsource services.



Meet Your Co-Presenter



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.



FMLA: Know the Facts

Employer Responsibility

- **DOL Employer ELAW FMLA Guidelines**
 - <http://www.dol.gov/compliance/guide/fmla.htm>
- **DOL Fact Sheet #28G (February 2013): Certification of a Serious Health Condition under the Family and Medical Leave Act**
 - <http://www.dol.gov/whd/regs/compliance/whdfs28g.pdf>

DOL: What You Need to Know



- Covered employers must post the revised [FMLA Poster](#) “Employee Rights and Responsibilities under the Medical Leave Act (as revised 01/16/09).
- Within 5 business days after an employee has informed you of the need for leave, the employer must complete and provide the employee with the [Notice of Eligibility and Rights & Responsibilities](#)
- Attach to the notice one of the following appropriate certification forms:
 - [WH-380-E](#)
 - [WH-380-F](#)
 - Exigency for Military Family Leave: [DOL Form WH-384](#)
 - Serious Injury or Illness of Service member for Military Family Leave: [DOL Form WH-385](#)
- The employer must give the employee at least 15 calendar days to return the form. Additional time may be allowed in some circumstances (7 day cure rule).
- Within 5 business days after an employee has submitted the appropriate certification form, the employer must complete and provide the employee with the designation notice.
 - [DOL Form WH-382 Employer Responsibility to Designate FMLA Leave and Notice to Employee](#)



Who Invokes the FMLA?



Pfizer: \$660,000

Employee says: “Boss, I need some time off for the international adoption my wife and I are involved in. We have a meeting with the adoption agency tomorrow afternoon, and I’d like to take the afternoon off.”

This is the only notice that the employee contended was necessary in order to invoke FMLA rights, and the Fourth Circuit agreed, based on a review of the case law and the applicable regulations. After the employee makes this request, the ball is in the employer’s court to figure out whether the leave is covered by the FMLA.

Michaels: \$8,000,000

A director of communications asked for FMLA leave for knee replacement surgery. He informed his boss that he would need 6 to 8 weeks of leave to get better. 10 days after the request, the boss recommended that the employee's position be eliminated and he was terminated.

The company claimed that the FMLA request had nothing to do with the layoffs. After all, the economy was sluggish and other layoffs had been made as a result. After the case had started, a review of the company emails revealed a message from the boss that basically said, “We may as well lay the employee off, because he will be on leave anyway.”

So now, the employee has enough to take his case to the jury. He can present facts that can put the termination in real light. How long had he worked there, his good employee reviews, raises, all that he did for the company.





FMLA Legal Issues



What is the cost of FMLA lawsuits?

- A typical defense for a summary of judgment: \$75,000 - \$125,000*
- A typical defense in a jury trial: \$175,000 - \$250,000*
- Credibility
- Morale

There are over 1,000 published FMLA court cases for 2013. This does not include out of court settlements and DOL judgments.

*May 14, 2013 Ohio Employer's Law Blog



FMLA Legal Issues



What damages can an employee seek/sue for?

- Wages, salary, employment benefits or other compensation denied or lost to such employee by reason of the violation (i.e. unlawful termination)
- Actual monetary losses sustained by the employees as a direct result of the violation, such as the cost of providing care (i.e. they had to pay out of pocket for a caregiver)
- Liquidated damages (2x)
- Interest
- Reinstatement, Promotion w/ front pay



FMLA Relationships



- ✓ Children
- ✓ Parents
- ✓ Spouses
- ✓ Next of Kin (Military Service Member)

Child FMLA Relationships



Children – Under 18 FMLA with the exception of Adult Children

- ✓ Biological
- ✓ Adopted
- ✓ Step
- ✓ Foster
- ✓ Legal Ward/Custody

- ? In Loco Parentis
- ? Adult Children



Child FMLA Relationships



Children – In Loco Parentis

Presume parents must provide either:

- Day-to-day care for the child, or
- Financial support for the child

Minimum Required

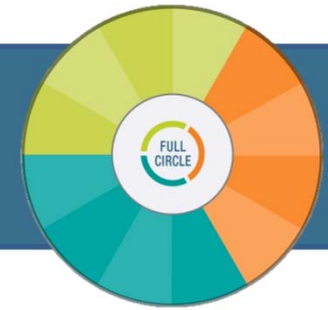
Documentation:

- A simple statement asserting the relationship (written?)

A relationship situation in which a person has put himself or herself in the position of a parent by assuming and discharging the obligations of a parent to a child with whom her or she has no legal or biological connection. It exists when an individual intends to take on the role of a parent.



Child FMLA Relationships

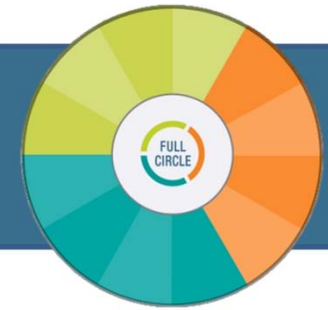


Children – In Loco Parentis

Courts have indicated some factors to be considered in determining in loco parentis status, including:

- the age of the child
- the degree of which the child is dependent on the person
- the amount of financial support, if any, provided
- the extent to which duties commonly associated with parenthood are exercised

Adult Child FMLA Relationships



Children – Adult Children

“Incapable of self-care in at least 3 ADLs or IADLs because of a mental or physical disability.

Instrumental activities of daily living (IADLs)

are not necessary for fundamental functioning, but they let an individual live independently in a community, including:

- Housework
- Taking medications as prescribed
- Managing money
- Shopping for groceries or clothing
- Use of telephone or other forms of communication
- Using technology (as applicable)
- Transportation within the community

Activities of Daily Living (ADLs) refers to daily self care activities within an individual’s place of residence, outdoor environments or both. Basic ADLs consist of self-care tasks including:

- Bathing and showering
- Bowel and bladder management (recognizing the need to relieve oneself)
- Dressing
- Eating (including chewing and swallowing)
- Functional mobility
- Personal device care
- Personal hygiene and grooming
- Toilet hygiene

Adult Child FMLA Relationships



Adult Children

ADAAA Definition of Disability: An impairment that substantially limits a major life activity comparatively to most people.

- Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more body systems.
- Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness and specific learning disabilities.

Parental FMLA Relationships



Parents

- ✓ Biological
- ✓ Adopted
- ✓ Foster

? In Loco Parentis

? Step

? In-laws

? Legal/Power of Attorney for Medical Decisions





Parental FMLA Relationships



Parents – In Loco Parentis

Unless an in loco parentis relationship existed when the employee was a child (under 18), an employee is not entitled to take FMLA leave to care for a grandparent, an aunt or another non-covered relative or other person with a serious health condition.

Minimum Required Documentation:

- A simple statement asserting the relationship (written?)



Parental FMLA Relationships



Parents – Step, In-Laws, Legal/POA

Step

- **Possibly.** Only if the employee was under 18 when the relationship began (In Loco Parentis). Use caution

In-Laws*

- **No.** Only certain states provide In-Law benefits
 - Connecticut, Hawaii, New Jersey, Oregon, Vermont, Washington
 - Wisconsin (for parent of domestic partner)

POA*

- **No.** Consult counsel or local DOL office
 - Siblings – No (Certain states: Maine, Minnesota, Maryland)
 - Grandparents – No (Certain states: Hawaii, Minnesota, Oregon, Washington)

<http://www.dol.gov/whd/regs/compliance/whdfs28C.pdf>



Spouse Relationships



Spouse

- ✓ Traditional Marriage
- ✓ Common Law/Informal Marriage (according to state law)
- ? Same Sex Marriage / Civil Union / Domestic Partner





Spouse Relationships



Spouse – Same Sex Marriage / Civil Union / Domestic Partner

- Marriage – California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, New Jersey, Rhode Island, Vermont, Washington and the District of Columbia & New Mexico allows it in 8 of 33 counties
- Civil Union – Colorado, Hawaii, Illinois, New Jersey
- Domestic Partnership (same or opposite sex) – California, Nevada, Oregon and Washington, Hawaii, Maine, Wisconsin and the District of Columbia, (effective June 30, 2014, domestic partnerships in Washington will be limited to folks who are at least 62 years old.



Spouse Relationships



Spouse – FMLA Eligible?

- Opposite sex Marriage State – YES
- Opposite Sex Common Law / Informal Marriage State – YES (in states that recognize it)
- Same Sex Marriage State – YES (if employee is residing in any state where legal)
- Civil Union and/or Domestic Partner State – NO (state leaves)



● ● ● Serious Health Conditions



FMLA Critical Definitions

- **Incapacity** – means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment or recovery there from.
- **Treatment** – RX regimen, PT/OT, chemical therapy, psych. Therapy, manual manipulation of the spine, surgeries other than cosmetic, evaluation tests for the mere existence of a SHC.



Serious Health Conditions



Types of SHCs

- In Patient – overnight hospital stay
- Continuing Care
 - Pregnancy or prenatal care
 - Incapacity and treatment
 - Chronic conditions
 - Multiple treatments
 - Long term / permanent
- Substance Abuse Treatment

● ● ● Serious Health Conditions



Pregnancy – Any period of incapacity for pregnancy or prenatal care

- Does not have to receive treatments to miss work
- Can be incapacitated for any period of time
- Morning sickness, ultrasound, blood work etc.

Many states have PDL with very low or no threshold for eligibility and some pay partial wage replacement.

Serious Health Conditions



Critical Definitions

- Unable to perform the functions of the position – employee is unable to work at all, or is unable to perform any one of the essential functions of the employee’s position.
- An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence.

Outside work activities – while on FMLA “or other leave.” Work at another employer “or” volunteer services allowed?

Job descriptions – essential job functions



Serious Health Conditions



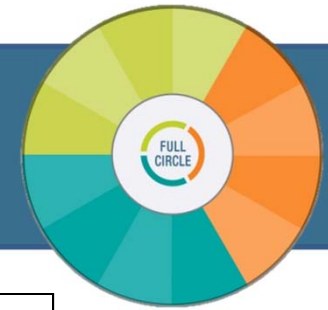
Incapacity AND Treatment – incapacity of more than 3 consecutive full calendar days

- 72 hours and 1 minute will suffice
- Schedule days off or weekends may / might count
- 2 conditions which, by their self, would not constitute a “serious health condition” can be “temporally linked”
- 1st in person office visit in 7 days (exceptions?)
 - Continuing treatment (RX, therapy, etc.)
 - OR 2nd in person office visit for treatment within 30 days



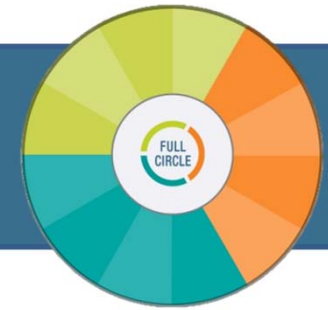


Incapacity and Treatment DOL



PART A: MEDICAL FACTS
1. Approximate date condition commenced: <u>9/26/13</u>
Probable duration of condition: <u>4-5 days</u>
Mark below as applicable: Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. If so, dates of admission:
Date(s) you treated the patient for condition: <u>9/26/13</u>
Will the patient need to have treatment visits at least twice per year due to the condition? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes.
Was medication, other than over-the-counter medication, prescribed? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes.
Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. If so, state the nature of such treatments and expected duration of treatment:
2. Is the medical condition pregnancy? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. If so, expected delivery date: _____
3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions. Is the employee unable to perform any of his/her job functions due to the condition: <input type="checkbox"/> No <input checked="" type="checkbox"/> Yes. If so, identify the job functions the employee is unable to perform: <u>Any/ All</u>
4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment): <u>Condition Requiring Specific Time off from Work</u>

Serious Health Conditions



PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? No Yes.

If so, estimate the beginning and ending dates for the period of incapacity: 9/26 - 9/30

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? No Yes.

If so, are the treatments or the reduced number of hours of work medically necessary?
 No Yes.

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

Estimate the part-time or reduced work schedule the employee needs, if any:

_____ hour(s) per day; _____ days per week from _____ through _____

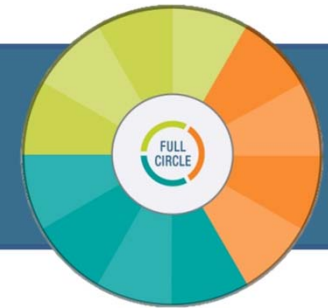
7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? No Yes.

Is it medically necessary for the employee to be absent from work during the flare-ups?
 No Yes. If so, explain:

DENIED



Chronic Condition - DOL



PART A: MEDICAL FACTS

1. Approximate date condition commenced: 8/13/13

Probable duration of condition: Lifetime

Mark below as applicable:
Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
 No Yes. If so, dates of admission:

Date(s) you treated the patient for condition:
8/13/13

Will the patient need to have treatment visits at least twice per year due to the condition? No Yes.
Was medication, other than over-the-counter medication, prescribed? No Yes.

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
 No Yes. If so, state the nature of such treatments and expected duration of treatment:

2. Is the medical condition pregnancy? No Yes. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition: No Yes.

If so, identify the job functions the employee is unable to perform:
Totally disabled when condition is active

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment, surgery, or use of specialized equipment):
Low back pain

APPROVED

Serious Health Conditions



Medical Treatments

- For restorative surgeries (breast reconstruction, etc.)
- Absences for treatment and recovery periods
- If left untreated the condition would last more than 3 consecutive days (ex. Dialysis, chemo, radiation)



● ● ● Serious Health Conditions



Permanent / Long Term Conditions

- Treatments not required
- Supervision is required
- The patient's period of incapacity is generally continuous, but the care does not have to be continuous.
- The difference between a chronic condition versus a permanent condition is that active treatment is required for chronic conditions.

Ex- Patient permanently incapacitated and home bound but EE caregiver may take leave intermittently to care or transport patient. Alzheimer's, stroke, etc.



● ● ● Serious Health Conditions



Substance Abuse – may be a serious health condition if one the serious health condition’s definitions are met.

- In Patient
- Continuing Care
 - Incapacity and Treatment
 - Chronic conditions, multiple treatments, long term / permanent pregnancy?

Serious Health Conditions



Substance Abuse (continued)

- No Terminations for applying for FMLA (*prior to being discovered*)
- Terminations for Substance Abuse before applying permitted
- Terminations for substance abuse while on another type of FMLA is permitted
- Caregiver for Substance Abuse is permitted
- No terminations of caregiver during care for family member being treated for Substance Abuse (*under the care of a HCP*)

Recertification Do's & Don'ts



Continuous Leaves – when its it ok to recertify?

- After the certified ending date

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? No Yes.

If so, estimate the beginning and ending dates for the period of incapacity: 10/9/13 - 11/7/13

- In this case, a recertification may be requested on 11/8.



Recertification Do's & Don'ts



Continuous Leaves - when is it ok to recertify?

- The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

Example: An employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave; such information might be sufficient to cast doubt upon the continuing validity of the certification, allowing the employer to request a recertification.



Recertification Do's & Don'ts



Intermittent Leaves - when is it ok to recertify ?

- After 6 months, if the certified duration is “lifetime,” in connection with the next absence.
OR..
- The employer receives information that casts doubt upon the employee's stated reason for the absence, or the continuing validity of the certification in connection with an absence.

Example: An employee calls out FMLA leave for a migraine, and the employee subsequently takes their children to the public swimming pool during working hours; such information might be sufficient to cast doubt upon the continuing validity of the certification, allowing the employer to request a recertification.





Intermittent Leaves - when is it ok to recertify?

- “Significant” changes to the frequency or duration of absences in connection with an absence. Example: Migraines certified 2X/month at 2 Days/episode start running 4X/month and 3 Days/episode
- Easily recognizable timing or patterns of absences in connection with an absence. Example: If an employee had a pattern of using unscheduled FMLA leave for back pain in conjunction with his or her scheduled days off.



Recertification Do's & Don'ts



Don't Recertify:

- Without a connection to an absence
- Before the next day after the certified end date of a continuous leave
- Without a legitimate concern over the employees eventual RTW
- For the purpose of discouraging someone from taking leave
- Without a reasonable suspicion of fraudulent activity
- In a discriminatory manner (don't pick & choose)



Leave Beyond FMLA



Leave as a Reasonable Accommodation

- Must be considered at the exhaustion of FMLA
- No date certain auto termination policies allowed
- May allow for requesting more specific medical information

Can be denied if:

- There is another effective accommodation that would enable the person to perform essential functions of his/her position (exceptions apply)
- There is an **undue hardship** – recommend a 3 times rule before determining undue hardship

Leave Beyond FMLA



Leave as a Reasonable Accommodation

Other effective accommodations (ADAAA) can take the form of reassignment, modified policies, part-time schedule or job restructuring. *Keep in mind same or similar under FMLA*

Employer Undue Hardship Considerations (not all inclusive list)

- Financial resources
- Number of employees
- Temporary Labor
- Impact on Operations
- Indefinite Leaves
- Do not list as a consideration – “moral of co-workers”



Record Keeping (Min. of 3 Years)



- Hours of FMLA leave taken in increments of less than one full day
- Copies of employee notices of leave furnished to the employer
- Copies of all written notices given to employees as required under FMLA
- Documents describing employee benefits or employer paid and unpaid leave policies and practices (*policies may change over time)
- Premium payments of employee benefits
- Records of disputes regarding FMLA
- GINA Disclosures (document “safe harbor language”)

All kept in a separate confidential file!

Military Leaves



	Exigency	Injury
Length	12 weeks	26 weeks
Next of Kin	No	Yes
Post Discharge	90 days*	5 years
Leave Year	Policy	Single 12 Month <i>(rolling forward)</i>
Spouses S/E Sharing	No	Policy
Parent of Milt Mem Care	Yes	No?/Yes?
DOL Forms	WH-384	WH-385 or WH-385V

*Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers



Questions

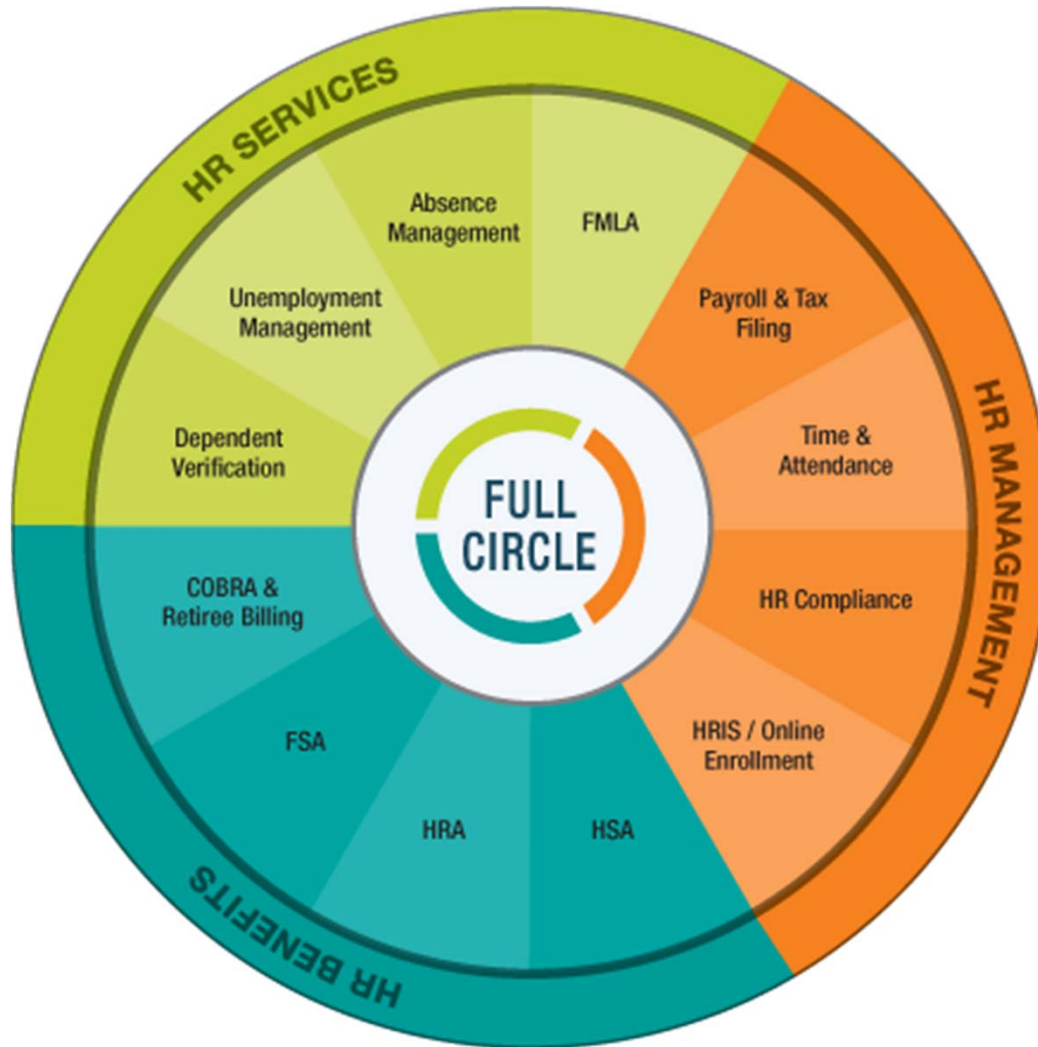
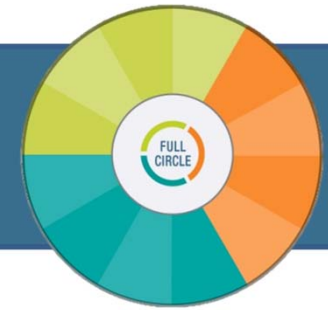


- HR Benefits
- HR Management
- HR Services

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.



Contact Us



HR solutions should be simple.
Keep it BASIC.



800.444.1922
sales@basiconline.com



Disclaimer



This presentation is designed to provide accurate information in regard to the subject matter covered. It is provided with the understanding that BASIC is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent attorney or other professional person should be sought. Due to the numerous factual issues which arise in any human resource or employment question, each specific matter should be discussed with your attorney.