



FMLA: Costly Employer Mistakes

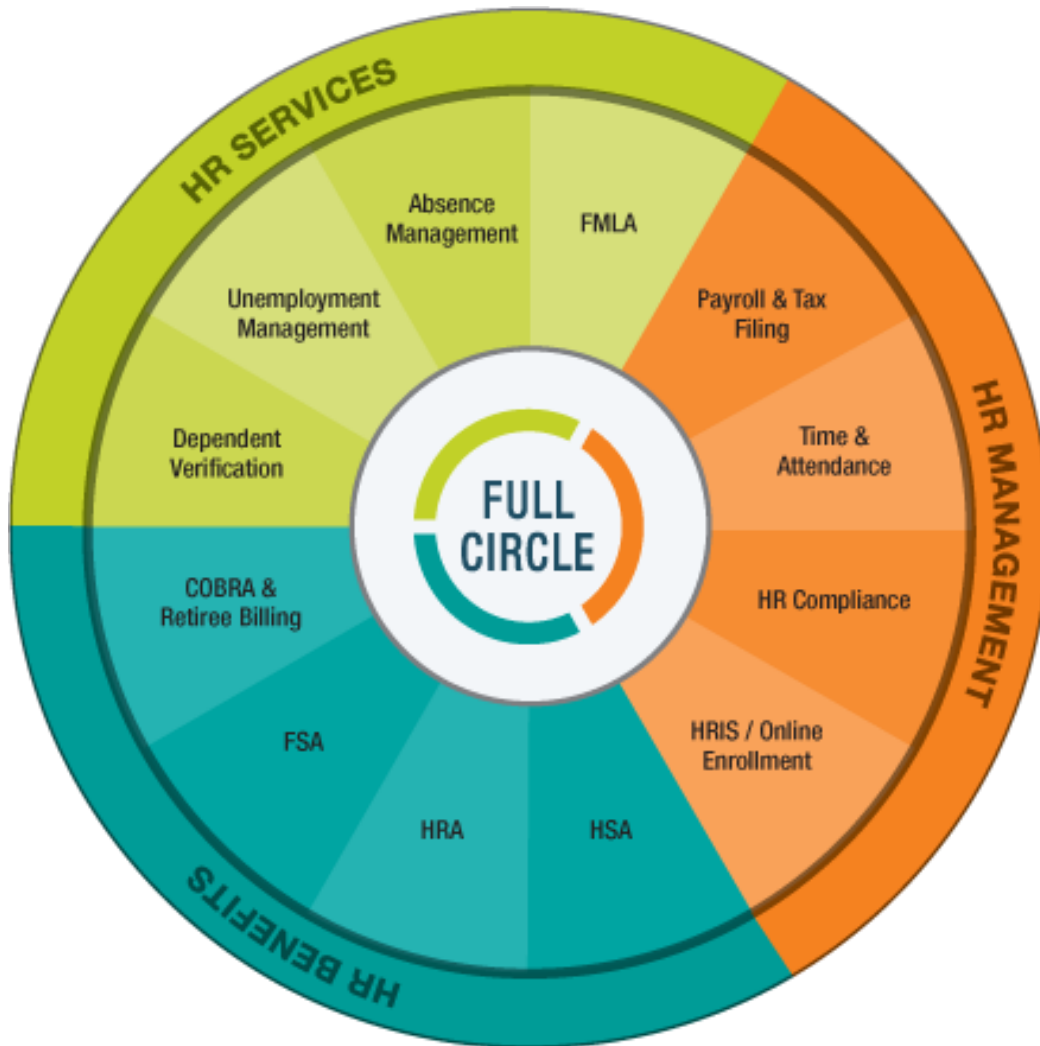
Presented by: Joe Aitchison, SPHR



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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.

Agenda



- Brief Overview of the FMLA
- Most common mistakes made by employers
 - Risk associated with mistakes
- Best practice to avoid FMLA Mistakes
 - Procedures to follow
 - Record keeping – what is it and how to do it.
 - Supervisor / Manager training – what they need to know and do
 - Employee Notification requirements
- How a DOL Compliant is filed / Initiated
 - Best response to a compliant
 - What to expect
 - Chances for appeal

FMLA: 101 ~ *The BASICS*



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

Determining Leave Entitlements



Employees are entitled to a total of 12 work weeks of leave during any 12-month period. Employers should make certain that the 12-month period is clearly identified in your policies:

- The calendar year
- Any fixed 12-month “leave year,” such as a fiscal year, or a year starting on an employee’s “anniversary” date”
- The 12-month period measured forward from the date any employee’s first FMLA leave begins.
- A “rolling” 12-month period measured backward from the date an employee uses any FMLA leave.

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 to?
- Employees
 - 1,250 hours ~ *most recent 12 month period*
 - 12 months of service ~ *the seven year rule*

Family Definitions



Spouse: A husband or wife as defined or recognized by state law for purposes of marriage. *We'll talk about Defense of Marriage Act (DOMA) later.*

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
- **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”
 - ***Incapacity***: “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

Continuing Treatment



- 3 Days - Incapacity & subsequent treatment
- 2 Treatments - Under care of the health care provider
- 1 Occasion of treatment resulting in a regimen of treatment under the supervision of a health care provider

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

2nd and 3rd Opinion



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

Calling In “Sick”



Employees can not simply call in sick for approved FMLA leave. They must present information that links the absence to the approved FMLA leave.

Hidden FMLA Abuse In Multiple Claims

Track by day on calendar

Track days of week for each claim and for all claims.

Use claim numbers or identifiers

Military Leave – Qualifying Exigency



- Now open to all armed services
- Extended R&R from **5 leave days** to **15 calendar days**
- Added parental leave



FMLA's Military Leave



- Military Caregiver Leave for Serious Injury or Illness
 - Current service member
 - Covered veterans
- Leave may be taken to provide care for mental health conditions (for example, PTSD, effects of traumatic brain injury)
- Includes leave to take the service member to treatment and to provide care during periods of incapacity (short or long - up to 26 weeks in a single 12-month period)
- Taken from Department of Labor: The Family and Medical Leave Act (FMLA) and Mental Health Issues by Diane Dawson - U.S. Department of Labor, Branch Chief

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

Military 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
 - 2nd and 3rd opinion can be requested only when certified by HCP as defined in 825.125

Military Leave – Caregiver



- Health Care Provider include non DOD/Tricare providers
- You can ask for second/third opinions for certifications completed by non DOD/Tricare providers
- Injuries or Illness include conditions aggravated as a result of active duty
- Covered members include retired service discharged for any reason other than dishonorable (5 years)

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)

DOMA & the FMLA~ Same Sex Marriage



One of the biggest critiques of the Family and Medical Leave Act has been that its definition of 'family' wasn't inclusive. Specifically, FMLA did not recognize legally married same sex partners as spouses.

June 26, 2013

- **IRS** ~ Supreme Court Strikes Section 3 of DOMA as being unconstitutional.
 - State of NY / Tax filing matter of same sex married couple-married in Ontario, Canada & recognized in New York but not by feds. Resulted in additional taxes on a \$365, 000 estate as not being a recognized spouse.
- **ERISA / DOL** ~ **Spouse:** means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including "common law" marriage and same-sex marriage. (*DOL Fact Sheet 28F*)

DOMA & the FMLA~ Same Sex Marriage



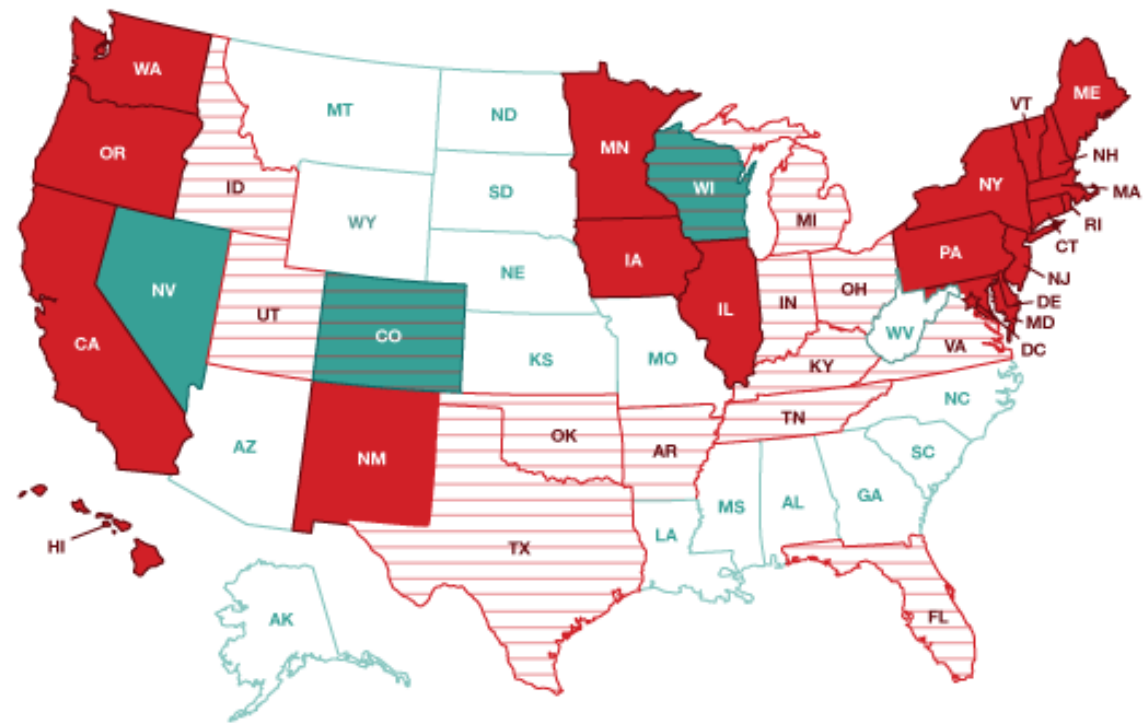
State example and the Problem

- **Washington State** ~ Under the state's marriage equality law, it's legal for same-sex couples to apply for FMLA benefits, including 12 weeks of unpaid leave to take care of a family member or spouse.
- **Michigan** ~ Does not recognize same-sex marriage, same sex married couples will still be barred from accessing FMLA ... *Unless approved by the employer.*
- **Problem** ~ most likely complicate cross-state job searches for spouses looking for places that will recognize their marriage. Efforts are underway by advocates at the federal level to protect same-sex couples' rights to family and medical leave regardless of where they reside.

States that Recognize Same Sex Marriage



Winning the Freedom to Marry: Progress in the States



-  Freedom to Marry
-  Pro-marriage court ruling, on hold pending appeal
-  Civil Union / Domestic Partnership, lawsuit filed
-  Marriage ban, lawsuit filed awaiting ruling

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?



Common FMLA Mistakes



- Termination or Discipline for Missed Work Time
- Leave Denial
- Point System/“No Fault” Policy
- Failure to Recognize Sufficient Information for Designation
- Failure to Provide Notice
- Medical Certification & Recertification Issues
- Retaliation and Interference

FMLA Trend



Social Media Employees posted pictures on Facebook

- Coworkers complained
- Management investigated
- Terminated Employees



ADA enforcement

- FMLA ends after 12 weeks but EEOC is taking the stance that additional time is a job accommodation

FMLA Trend



- 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 time
- When do you determine when employee is exceeding frequency and duration?

FMLA: Steps to effectively manage FMLA



FMLA Employer Objectives



- Reduce unplanned absences
- Protect legitimate FMLA leave
- Stem misused or abusive and fraudulent FMLA claims
- Integrate FMLA, STD, Worker's Comp identification
- Reduce & simplify demand on HR staff

Best Practices



- Review policies and procedures
- Consistency, consistency, and more consistency!
- How do you handle accusations of FMLA abuse?
- Have a training program every 12 months on FMLA.
 - Train Managers & Supervisors

Certification: Serious Health Condition



SIX SERIOUS HEALTH CONDITION CATEGORIES UNDER THE FMLA:

1. Hospital Care
2. Absence Plus Treatment
3. Pregnancy
4. Chronic Conditions Requiring Treatments
5. Permanent/Long-term Conditions
6. Multiple Treatments



Running FMLA concurrent with Paid Leave



- Reduces employer exposure
 - PTO
 - STD/LTD
 - Workers Comp
- Must return to original position
 - Unless past 12 weeks allotment under FMLA
 - Advantageous to not have WC claim/absences go one year because FMLA returns (based on employer's tracking system).

What is not a SHC?



- 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)



EMPLOYER RESPONSIBILITY

- DOL enforcing employee's "understanding" of rights and responsibilities
- Employee must understand rights and responsibilities
- Employer must defend practices and procedures

Tip: Add single sheet handout at time of request explaining rights and responsibilities to support HB, postings...Include a statement of do's and don'ts

Family Medical Leave Act

5 THINGS YOU NEED TO KNOW



1. Restricted or Light Duty – Cannot be required
2. Fitness-to-Return-to-Work Certification – Only if allowed under a policy or practice that requires employees who have been on a similar type of leave of absence
3. Reinstatement – Required reinstatement to the same or an equivalent job. - No undue hardship exception.
4. Benefits While on Leave – Health coverage must be continued at same level as prior to the leave. Other Leave determined by Written Policy.
5. Enforcement – U.S. Department of Labor
 - Damages - Back Pay, Front Pay & Liquidated Damages

Is your organization prepared for a DOL Investigation?



The new Department of Labor FMLA Branch Chief is calling 2014 a "pivotal" year for FMLA enforcement through a renewed focus on conducting compliance investigations with an emphasis in on-site FMLA visits. Going forward, the DOL has the authority to come on-site whenever it deems appropriate. The DOL states that the standard request for information will be over a two-year period, and that the agency's focus is to bring employers into compliance with the law and remedy any FMLA violations. These investigations have resulted in an increased number of unprepared companies that are paying costly settlements and fines for not being FMLA compliant.

Employers Be Aware:

- The DOL is focusing its attention on systemic FMLA issues. Whether it is a single or multi-employee charge of discrimination, the EEOC is requiring:
 - broad and burdensome requests for information that cover multiple years and locations, while also investigating a wide range of personnel actions.
 - The DOL's standard request will seek information for a two-year period.
- Employee interviews will become standard practice in an on-site visit.
- The DOL wants to know if your managers and employees in the leave process are familiar with your FMLA policy. Managers will also be expected to walk a DOL investigator through an employee's leave request.

Focus

- Areas or Departments where leaves of absence tend to be more frequent.
 - greater chance in these areas that the employer has not complied with FMLA notice and/or certification requirements.
 - The DOL finds that front-line managers in these areas tend not to be familiar with the FMLA and its obligations.

DOL - Two types of FMLA claims



- Interference claim: employer denied or interfered with employee's rights under the FMLA
- Retaliation claim: employee suffered an adverse employment action because the employee engaged in an activity protected by the FMLA

Interference Claims



1. Claimant was an eligible employee under the FMLA;
2. Defendant is an employer as defined under the FMLA;
3. Claimant was entitled to leave for a reason covered by the FMLA ;
4. Notice of Claimant's intention to take leave was given the employer;
5. Claimant was denied a benefit to which he or she was entitled under the FMLA.

Interference FMLA Claims



- Interference with FMLA rights: employer denied the employee FMLA benefits to which he was entitled
- Any FMLA violation can be “interference”
 - Examples:
 - Denying FMLA leave
 - Discouraging employee from taking leave
 - Denying reinstatement following leave

Types of Retaliation FMLA Claims



- Retaliation: employer makes an adverse decision with respect to the employee's terms & conditions of employment because the employee exercised rights under the FMLA
 - Examples:
 - Terminating employee because she requested FMLA leave
 - Demoting employee because he is taking intermittent leave to care for a family member
 - Considering FMLA absences as a negative factor in performance reviews or project assignments

Remedies available for FMLA claims



- ✓ Reinstatement
- ✓ Back pay – lost income prior to court decision or settlement
- ✓ Front pay – projected future/ongoing lost income
- ✓ Value of lost benefits (e.g., medical expenses)
- ✓ Other monetary losses (e.g., hiring a caretaker instead of taking leave to care for a family member)
- ✓ Liquidated damages – for willful violations, an amount equal to actual damages plus interest (similar to punitive damages)
- ✓ Interest, costs, attorney's fees

What Prompts a DOL Investigation?



- Complaints
- Directed Investigation



Steps of a DOL Investigation



- Initial Employer Conference
- Examination of Records
- Site Inspection
- Employee and Manager Interviews
- Final Employer Conference
- Resolutions / Remedies
- Possible appeal
- Possible DOL lawsuit

Employer's FMLA Responsibility



- Two general notice requirements:
 - Posting – Conspicuous place, accessible to all employees; electronic posting OK
 - Handbooks or other written policies regarding employee benefits or leave rights; electronic OK
 - If no written leave policies, provide to all new hires
- Content of general notices:
 - Explain the FMLA's provisions
 - Provide information about filing a complaint with the Wage & Hour Division, DOL

Employer's FMLA Responsibility



2 Specific Notice Requirements

- Eligibility notice (oral or written) 29 CFR 825.300(b)
 - Within 5 business days of employer knowledge of employee need for FMLA leave
 - If employee is not eligible, notice must state at least one reason
 - Eligibility does not change for same leave reason during 12-month leave year
- Notice of Rights & Responsibilities
 - Provide each time employee eligibility notice is sent
 - Variety of specific rights & responsibilities addressed, including employer-specific policies
 - May include certification forms

Employer's FMLA Responsibility



FMLA Certification Form

- Notify employee of need for certification within 5 days of employer's knowledge of need for leave; provide form
- Notify employee of consequences of failure to return adequate certification
- Do not request more information than permitted by FMLA regs
- DOL forms permitted but not required
- Add GINA notice to certification for employee's SHC
- Provide employee 15 days to return completed cert form

FMLA 825 (a), (b), (c): "313" Covers delayed return of Certification ~ Employer beware ... delayed 380 E / F certification form by employee may be subject to DOL interpretation of "Extenuating Circumstances" ...

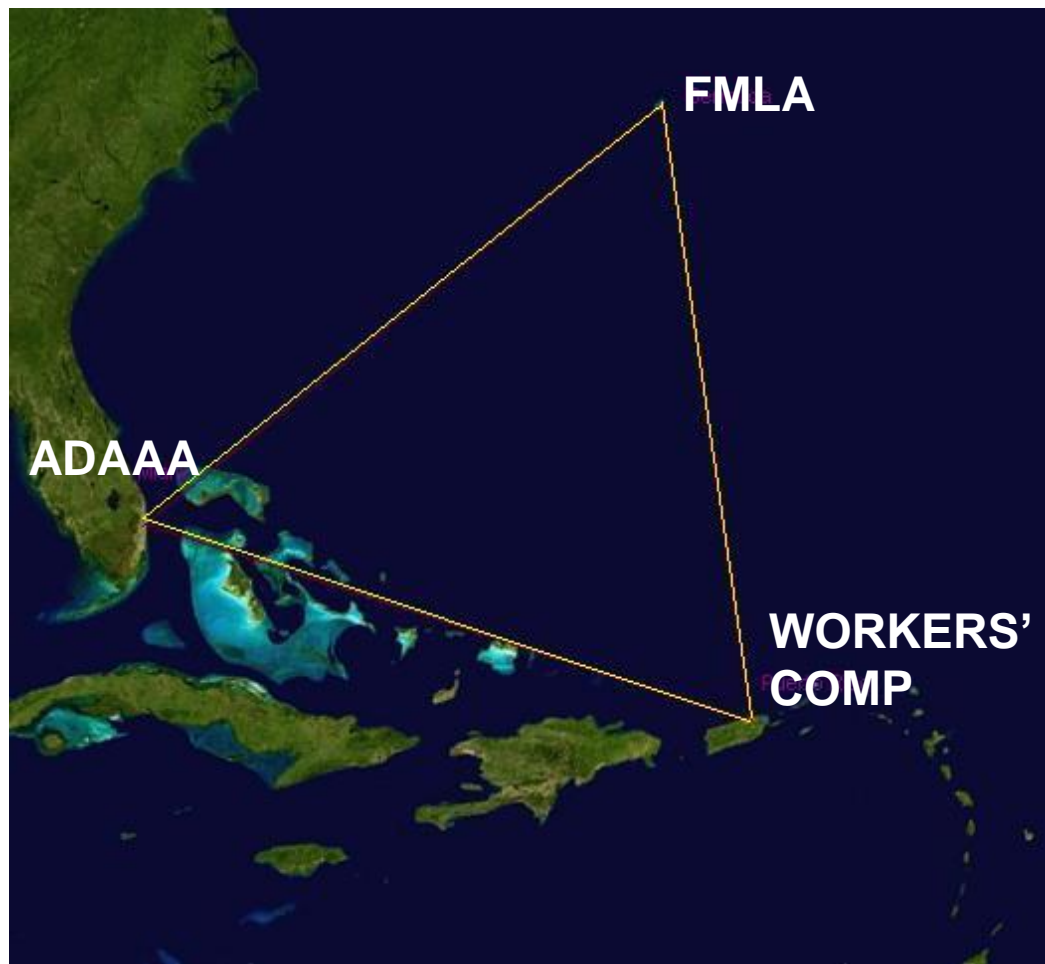
Employer's FMLA Responsibility



Incomplete or insufficient information on Certification

- Advise employee in writing of any insufficiency or missing info
- Allow employee 7 calendar days to cure the deficiencies
- Only if employee fails to cure can employer deny the leave for an incomplete or insufficient cert

Note: Authentication & Clarification





STEPS EMPLOYERS SHOULD TAKE TO ADDRESS THE CHANGES BROUGHT ABOUT BY THE RECENT CHANGES TO THE ADA:

1. Ensure that employees who qualify for FMLA due to their own serious health condition are also considered for ADA coverage, additional leave, and/or other accommodation.
2. Coordinate medical certification process so that the two legal standards (for serious health conditions and potential disability qualification) are met individually and documented.

ADA Enforcement Trends



TRAIN SUPERVISORS AND MANAGERS about complying with the amended ADA, in particular about the interactive process, requests for accommodation, and types of reasonable accommodation. Training supervisors not to retaliate in response to disability claims or requests for accommodation is also critical.

CHECK RECORDKEEPING PROCESSES to ensure adequate documentation of accommodation requests, steps in the **interactive process**, and reasons for granting/denying an accommodation request.

CHECK EQUAL EMPLOYMENT/NONDISCRIMINATION POLICIES to make sure they comply with the amended ADA and regulatory requirements.

Enforcement Trends



EEOC's increased attention to employer's obligations to provide more leave than the FMLA requires as a reasonable accommodation under the ADA (*UPS*, *Supervalu*, and *Sears* cases);

- The extension of retaliation protection to third parties such as close family members and fiancées (*Thompson*); *and*
- The addition of "cat's paw" liability, holding an employer liable when an unbiased manager bases his or her employment decision on the recommendation of a biased manager (*Staub* and *Blount* cases).





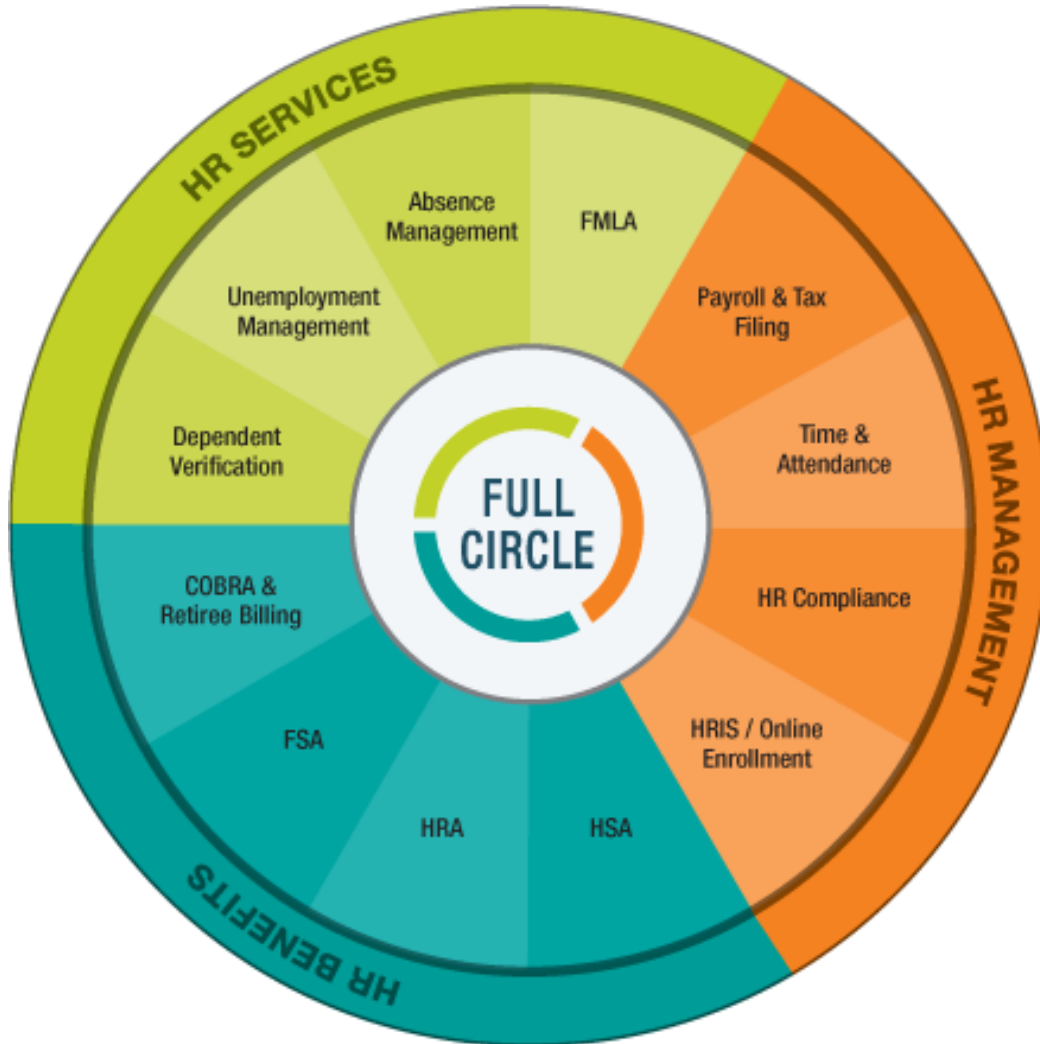
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