



# FMLA and DOL Investigations

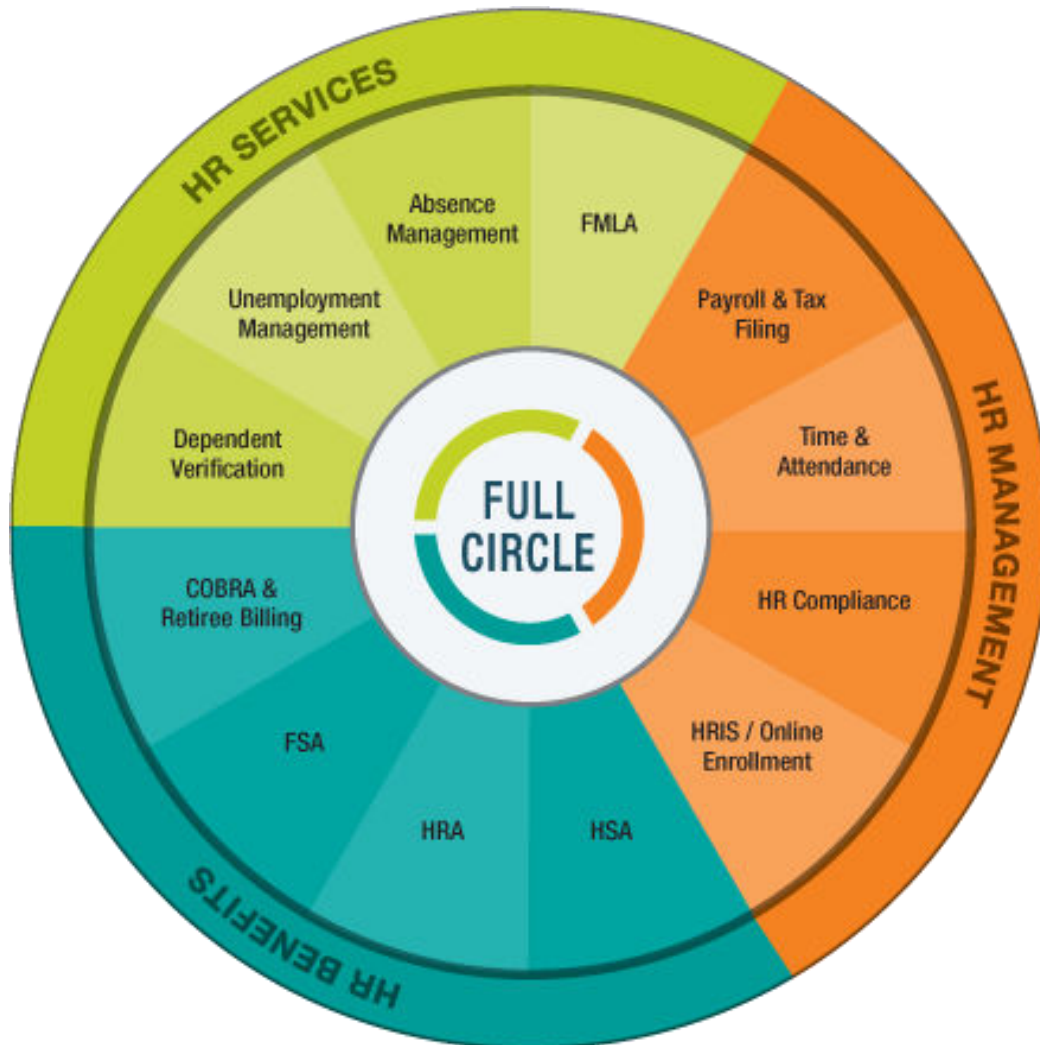
Presented by: Joe A. Aitchison



- HR Benefits
- HR Management
- HR Services

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# Presenter



## **Joe Aitchison, SPHR, SHRM-SCP, CHRS - 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, SHRM – Senior Certified Professional and Healthcare Reform Specialist by the Healthcare Reform Center & Policy Institute. Mr. Aitchison Serves on several for profit and not for profit boards.

# Agenda



- FMLA – The Basics
- Top 10 Employer Mistakes
- FMLA Compliance
  - Employer Risk
- Best Practice Recommendations
- Q & A & Closing

# FMLA- 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*



# Certification Process



## oNotices

- Rights and Responsibility (WH-381)
- Designation Notice (WH-382)

## oMedical Reason

- Medical Certification (380-E or 380-F)

## oBonding Leave

- Birth certificate
- Court order
- Adoption papers

## oMilitary

- 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

# 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

# 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

# Top 10 FMLA Employer Mistakes



# Employer 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”



# Employer Mistakes



## 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?



# Employer Mistakes



## 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*”

# Employer Mistakes

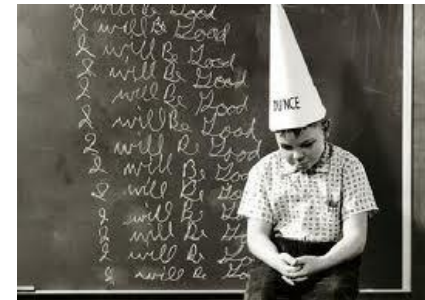


## 4. Disciplining Employee

- 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)

# Employer Mistakes



## 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?
  - Employee says....*“How was I suppose to know?”*



# 1. Notification Process cont.



## 1. Notification Process *Continued*

- Refer and direct employee questions to HR
- Certification Form 380 E/F given to employee within 5 days of FMLA event by employer
- Rights and Responsibility Notice must be given to employee by employer at time of certification request.
- Employee must return 380 E/F within 15 days (*Extenuating circumstances may apply*)
- If additional information needed the employee gets 7 days to complete
- Direct employee to HR if there is difficulty completing forms
- Notification of approval/denial/pending sent within 5 days
- Employee responsible for any cost



# Employer / Supervisor / Manager FMLA Mistakes



- Threaten 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

# Military FMLA



- **Exigency Leave**
  - Up to 12 weeks for spouse and/or dependents for family adjustments, and other
- **Caregiver Leave**
  - Up to 26 weeks of FMLA for aggravating an existing injury/illness or developing a injury/illness resulting from active duty
  - Calculated on a rolling forward calendar
  - Taken intermittently, reduced schedule, or continuously
- **Exigency Leave Reasons**
  - Short-notice deployment activities (7 calendar days)
  - Military events and related activities
  - Childcare and school activities
  - Financial and legal arrangements
  - Counseling activities
  - Rest and recuperation activities (15 calendar days)
  - Post-deployment activities
  - Parental Leave
  - Additional activities



# FMLA: Steps to Effectively Manage FMLA



# Best Practices



- Review policies and procedures
- Consistency, consistency, and more consistency!
- How do you handle accusations of FMLA abuse?
- Have a training program every 18 months on FMLA.
  - Train Managers & Supervisors



# Employers are not prepared for a DOL Investigation...



The new Department of Labor FMLA Branch Chief is calling 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 DOL 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 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 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

# 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

# Extenuating Circumstances



## **Additional Obligations for Employer**

- Reasons for Employee's failure to return documentation
- I did not understand (common language

**Employee No Fault "out"** Employers need to make sure that they include appropriate "extenuating Circumstances language in with their certification documentation & Rights and Responsibility notices....

# 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



# Questions



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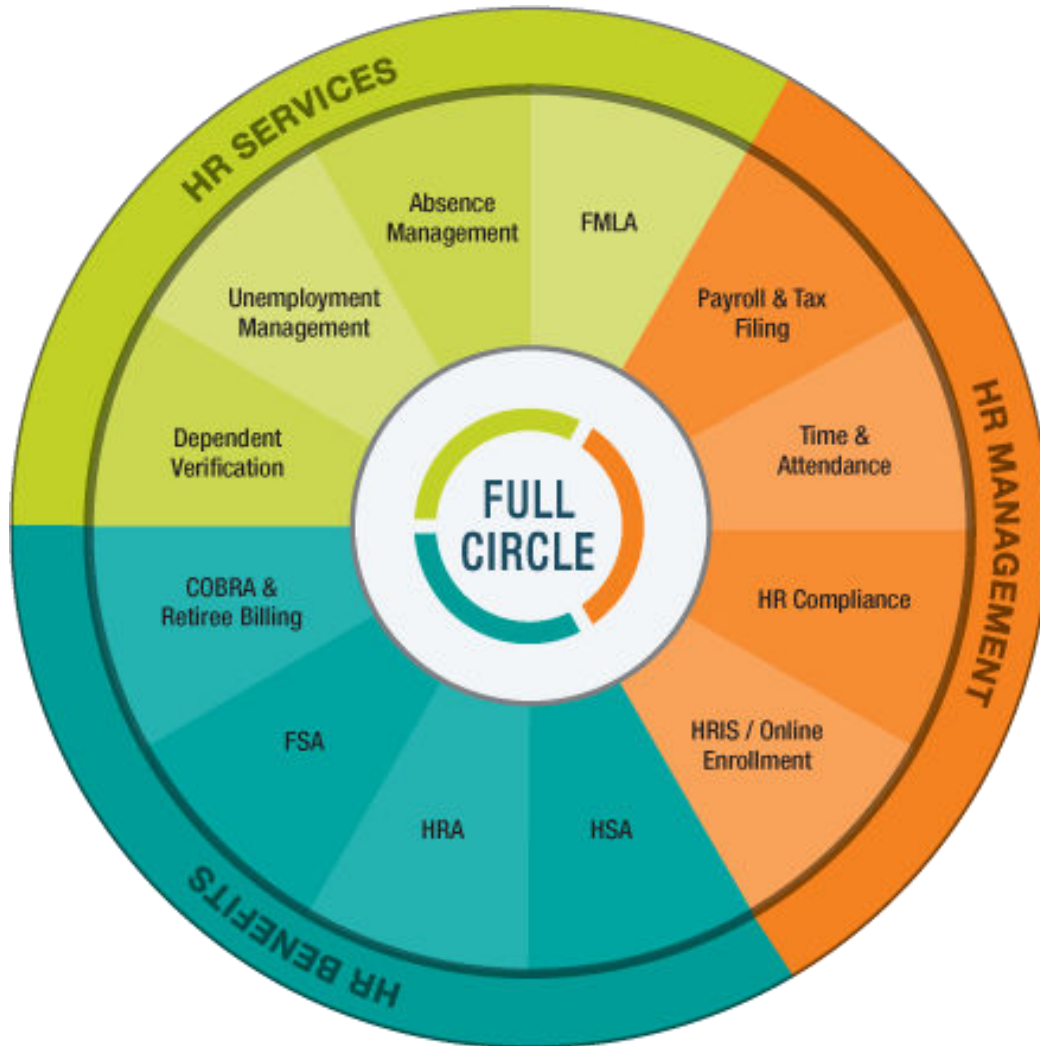


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