



Understanding the FMLA

Employer Best Practices and the DOL 2016 Fiscal Budget – Impact on FMLA

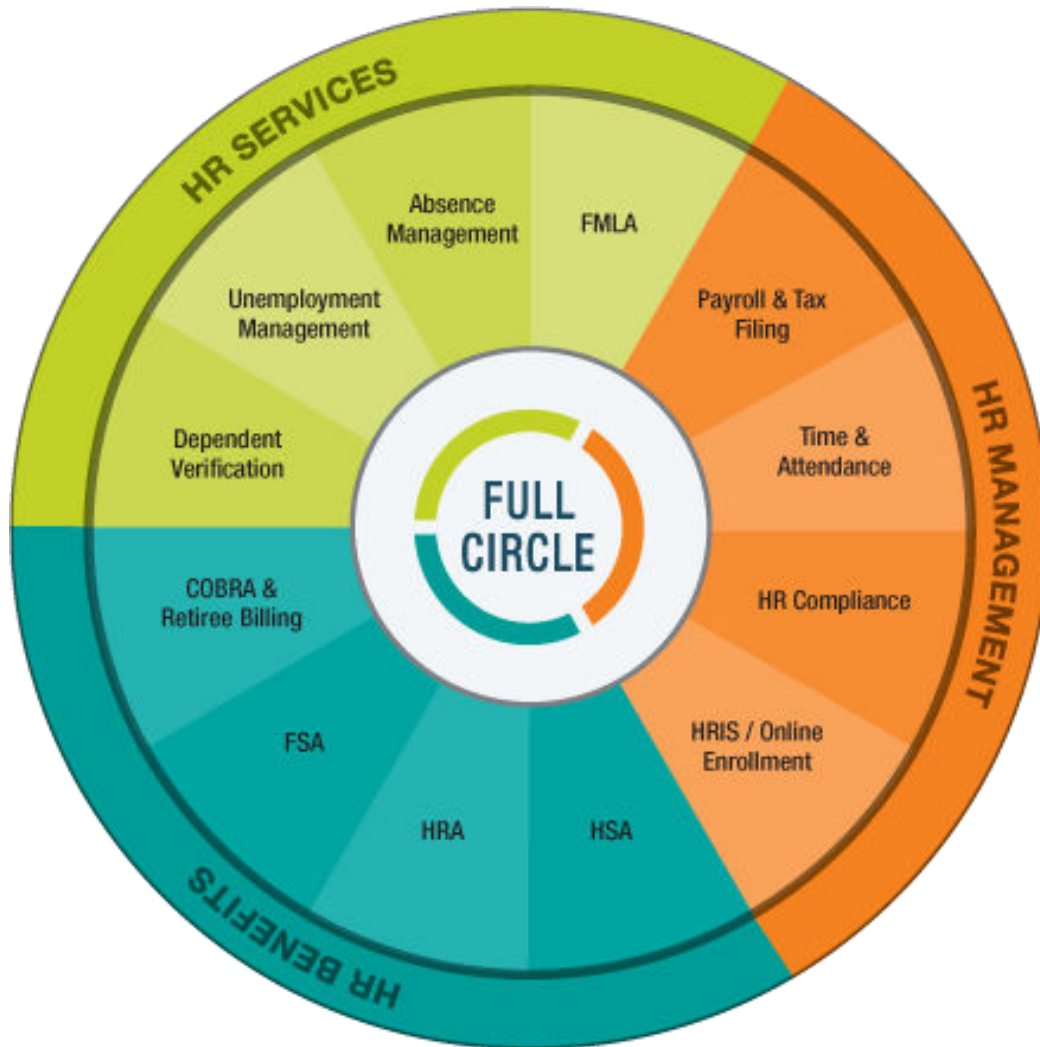
Presented by: Joe A. Aitchison



- HR Benefits
- HR Management
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Presenter



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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, 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 – From the DOL’s Perspective
- Top Employer Mistakes
- FMLA Compliance
 - Employer Risk
- Employer Best Practice Recommendations
- The DOL – 2016
- Q & A

Includes slide information form the DOL ~ www.dol.gov/whd

FMLA- The Basics



The DOL FML Philosophy

- The Family and Medical Leave Act codified a simple and fundamental principle: Workers should not have to choose between the job they need and the family members they love and who need their care
- The significance of the FMLA is in its recognition that workers aren't just contributing to the success of a business, but away from their jobs they are contributing to the health and well-being of their families



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

DOL's Perspective



- The FMLA has served as the cornerstone of the Department of Labor's efforts to promote work-life balance since President Clinton signed the legislation in 1993
- The best available evidence suggests that adopting flexible practices in the workplace potentially boosts productivity, improves morale, and benefits the economy



Purpose:

- Balance work and family life
- Promote economic security of families and serve national interest in preserving family integrity

Shared Responsibilities:

- Communication is key

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



- **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

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

Intermittent Leave



- In calculating the amount of leave, employer must use the shortest increment the employer uses to account for other types of leave, provided it is not greater than one hour *
 - Shortest increment may vary during different times of day or shift
 - Required overtime not worked may count against an employee's FMLA entitlement
- * Special rules apply for calculating leave for airline flight crew employees

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 FMLA Employer Mistakes



Employer Responsibility

- Provide notice
- Maintain group health insurance
- Restore the employee to same or equivalent job and benefits
- **Maintain records**



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



Employer Responsibilities



- Employers must inform employees of FMLA:
 - Post a General Notice, and
 - Provide General Notice in employee handbook or, if no handbook, distribute to new employees upon hire
- Electronic posting and distribution permitted
- Languages other than English required where significant portion of workforce not literate in English
- \$110 CMP for willful posting violation

Employer Responsibilities



Provide a Notice of Rights & Responsibilities

- Provided when eligibility notice required
- Must be in writing (optional WH-381)
- Notice must include:
 - Statement that leave may be counted as FMLA
 - Applicable 12-month period for entitlement
 - Certification requirements
 - Substitution requirements
 - Arrangements for premium payments (and potential employee liability)
 - Status as “key” employee
 - Job restoration and maintenance of benefits rights



Provide Notice of Designation

- Within five business days of having enough information to determine leave is FMLA-qualifying
- Once for each FMLA-qualifying reason per applicable 12-month period (additional notice if any changes in notice information)
- Include designation determination; substitution of paid leave; fitness for duty requirements
- Must be in writing (optional WH-382)
- If leave is determined not to be FMLA-qualifying, notice may be a simple written statement

Employer Responsibilities



Provide Notice of Designation

- Employer must notify employee of the amount of leave counted against entitlement,
- If amount of leave is unknown (e.g., unforeseeable leave), employer must inform employee of amount of leave designated upon request (no more often than 30 days)
- Retroactive designation permitted provided that failure to timely designate does not cause harm to employee

Employer Responsibilities



Group Health Benefits while on FMLA Leave

- Group health plan benefits must be maintained throughout the leave period
- Same terms and conditions as if employee were continuously employed
- Employee must pay his/her share of the premium
- Even if employee chooses not to retain coverage during leave, employer obligated to restore same coverage upon reinstatement
- In some circumstances, employee may be required to repay the employer's share of the premium if the employee does not return to work after leave

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.



Prohibited Employer Actions

- interfere with, restrain or deny employees' FMLA rights
- discriminate or retaliate against an employee for having exercised FMLA rights
- discharge or in any other way discriminate against an employee because of involvement in any proceeding related to FMLA
- use the taking of FMLA leave as a negative factor in employment actions

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....

ADA - EEOC Fact Sheet



U.S. Equal Employment Opportunity Commission

Fact Sheet on the EEOC's Final Regulations Implementing the ADA

In enacting the ADA, Congress made it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. Congress overturned several Supreme Court decisions that Congress believed had interpreted the definition of "disability" too narrowly, resulting in a denial of protection for many individuals with impairments such as cancer, diabetes, and epilepsy. The ADA states that the definition of disability should be interpreted in favor of broad coverage of individuals.

- The term "substantially limits" requires a lower degree of functional limitation than the standard previously applied by the courts. An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered "substantially limiting." Nonetheless, not every impairment will constitute a disability.
- The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, as was true prior to the ADA.

As required by the ADA, the regulations also make it easier for individuals to establish coverage under the "regarded as" part of the definition of "disability." As a result of court interpretations, it had become difficult for individuals to establish coverage under the "regarded as" prong. Under the ADA, the focus for establishing coverage is on how a person has been treated because of a physical or mental impairment (that is not transitory and minor), rather than on what an employer may have believed about the nature of the person's impairment.

Reference: http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm



Employer Required Documents



Record retention – 3 years

- Basic payroll information
- Dates FMLA leave is taken
- Hours of leave if leave is taken in less than one full day
- Copies of leave notices
- Documents describing benefits/policies
- Premium payments
- Records of disputes



Employee Rights – File a Claim



Employee have a right to:

- File a complaint with Wage and Hour Division
- File a private lawsuit
- Action must be taken within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful

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

DOL – WHD Budget



WAGE AND HOUR DIVISION BUDGET JUSTIFICATION

- The 2016 Budget request for Wage and Hour is \$277,100,000, an increase of \$49,600,000
- \$31,666,000 and **300 FTE for additional enforcement staff and support** dedicated to planned enforcement—as opposed to reactive—would allow the agency to address systemic compliance problems more strategically.

WHD is developing strategies to provide a more in-depth review of the employer’s business practices and leave policies with the objective of making a **broader impact on compliance, rather than resolving one individual complaint**. As a result, cases may require additional time to develop as part of this corporate-wide approach, which is reflected in the FY 2016 performance target.



Questions



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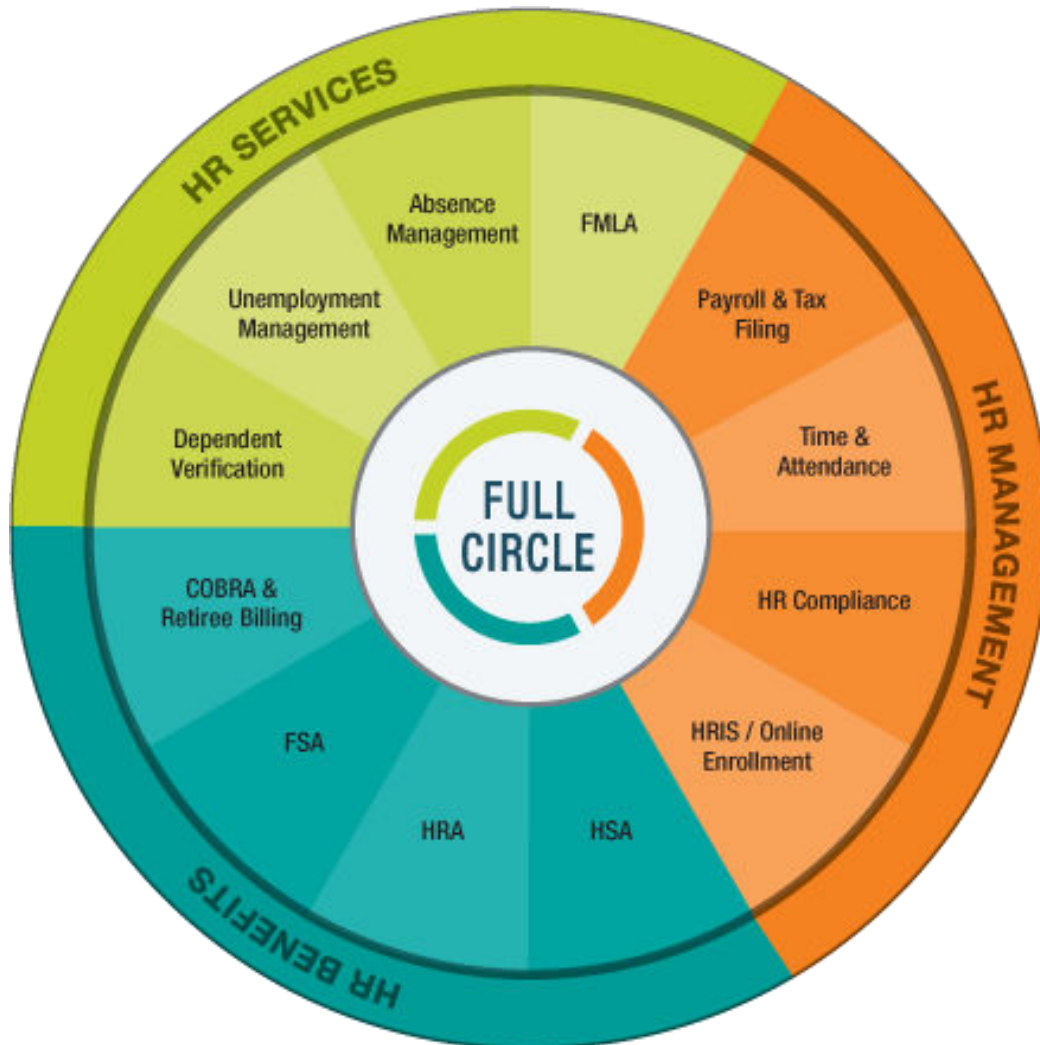
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