



# THE FMLA, ADA & WORKERS COMPENSATION

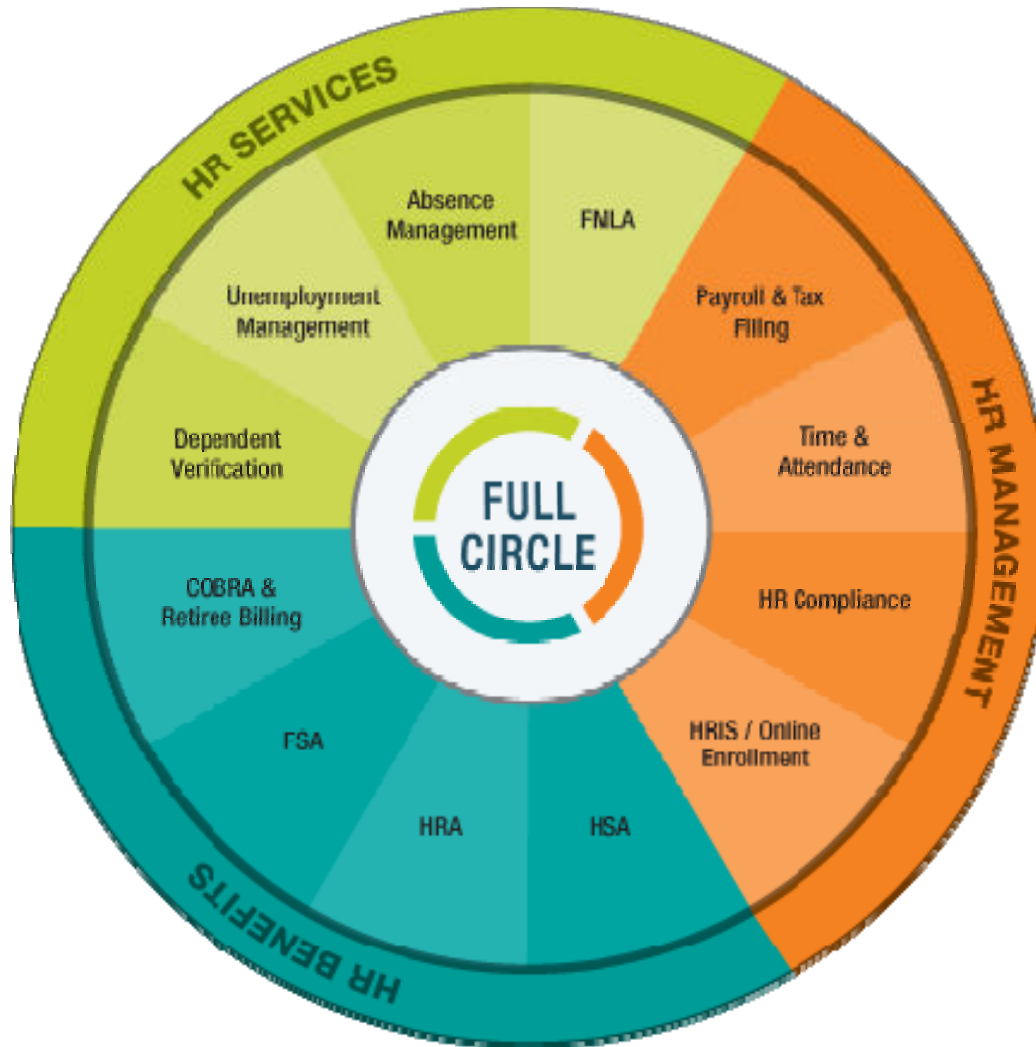
Presented by: Sarah K. Willey



- HR Benefits
- HR Management
- HR Services

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# Recent Case



- A federal court allowed an employee to take this case to a jury:
  - Employee was absent for 10 days without leave and had accrued 352 hours of unauthorized absence over 10 months
  - During the 10 day absence, employee was actually in a substance abuse rehabilitation program
  - Employee asserted that he requested leave to enter the program from his supervisor
  - Employer claimed that he did not inform his department that he needed leave before entering

# Interference - FMLA



1. Employee eligible for FMLA
2. Employer covered by FMLA
3. Employee entitled to FMLA leave
4. Employee provided notice of intention to take FMLA leave
5. Employer denied FMLA benefits to which employee entitled

Donald v. Sybra, In (CA6, 1/17/12)

## Retaliation - FMLA



- Employee engaged in FMLA protected activity
- Employer knew the employee was exercising FMLA rights
- Employer took an adverse employment action against employee
- Causal connection between FMLA activity and adverse action

Donald v. Sybra, In (CA6, 1/17/12)



# Disability Management: The Most Important & Complicated Employment Law Issue

# Disability Management Requires Knowledge in:



- FMLA Basics
- ADA Basics
- Identify / Discuss / Instruct regarding common Disability Management issues
- Discuss Overlap & Intersection between FMLA / ADA / Workers' Compensation





# Balloons – The Visual



- FMLA
- ADA
- Workers' Compensation
- Policies/Procedures
- CBA
- GINA





# FMLA Basics



- Paperwork intensive
- Recording employee absence calls is critical
- Without paperwork – SOL
- You are the gatekeepers
- No FMLA paperwork unless notice triggered



# Who Is a Covered Employee?



## Employee:

- Works at a site with 50 or more employees within a 75 mile radius
- Has worked at least 12 months (over last 7 years)
- 1250 hours (year prior to first leave date)
- All time worked as a temporary employee counts
- All time worked as a seasonal employee counts

# How Much Leave is Available?



- Twelve weeks of leave in whole / part
- Unpaid (under FMLA)
- Workweek equals employee's normal workweek
- Twelve Month Period
  - Calendar
  - Fiscal
  - Rolling Backward

# What Types of Leave are Required?



1. Birth or care of a child
2. Child adoption or foster care
3. Care (for a serious health condition) of:
  - a) Spouse
  - b) Son
  - c) Daughter
  - d) Parent
4. Employee serious health condition which disables employee from performing one or more essential job functions



# Serious Health Condition

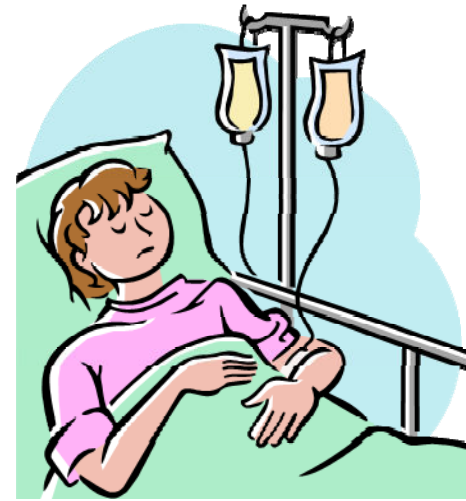


## Reference Guide – Certification of Health Care Provider

# Serious Health Condition



- Overnight Stay
  - Hospital
  - Hospice
  - Residential medical care facility



# Serious Health Condition



- More than three (3) consecutive calendar days incapacitated PLUS
  - Treatment two (2) times by a health care provider
  - First visit to health care provider within 7 days of first incapacity
  - Second visit to health care provider within 30 days of first incapacity

OR

- Treatment one (1) time by a health care provider within 7 days of first incapacity and a continuing treatment regimen



# Serious Health Condition



- Pregnancy



# Serious Health Condition



- Chronic Conditions
  - Periodic visits
  - At least two (2) visits to health care provider within one (1) year of first incapacity



# Examples



- Migraines
- Diabetes
- Depression
- Narcolepsy
- Asthma
- Epilepsy



# Serious Health Condition



- Permanent or long-term conditions for which treatment may not be effective.
- Patient still must be under the continuing supervision of a health care provider.
- Examples
  - Alzheimer's
  - Severe stroke
  - Terminal stages of a disease



# Serious Health Condition



- Conditions that require multiple treatments but do not necessarily incapacitate the employee
- Examples
  - Restorative surgery after an accident or other injury
  - Chemotherapy, radiation
  - Severe arthritis (physical therapy)
  - Kidney disease (dialysis)

# Serious Health Condition



- Substance Abuse
- FMLA applies only if treatment is provided by a health care provider, or on referral by a health care provider
- Notice and communication issues common

# Is an Employer Required to Reinstatement and Maintain Benefits?



- Restoration to position held when took leave
- Same pay, benefits on return
- Group health care coverage while on leave

# ADA Basics



## Employees Protected:

- Have a physical or mental disability that substantially limits a major life activity
- Have a history of having a disability
- Is regarded as having a disability



# General Employer Duty



- Employers cannot:
  - Refuse to hire or
  - Otherwise **discriminate** against someone based on a disability that does not interfere with the person's ability to perform the essential functions of the job.
- Employers are required to **reasonably accommodate** employees and applicants who suffer from physical or mental disabilities, provided those individuals are able to perform the essential functions of the job

# Reasonable Accommodation



- Duty:
  - The qualifications of applicants and employees must be evaluated without regard to the disabilities or the need for reasonable accommodation to perform the essential functions of an available job.



# Reasonable Accommodation



- Accommodation must be provided up to the point of undue hardship.
- Undue hardship means that an accommodation would be:
  - Unduly costly
  - Substantial
  - Disruptive
  - Would fundamentally alter the nature or operation of the business
- Employers are not required to allow an employee to work if there is a direct threat to the employee or others

# Scope of Duty



- Not an affirmative action statute. Employers are still free to select the most qualified candidate and insist that he or she be able to perform essential job functions, with or without reasonable accommodation.
- Quality & Quantity Standards. Employers are not required to lower quality or quantity standards (especially with regard to production) to make an accommodation.

# Scope of Duty



- Personal Use Items. Employers are not obligated to provide personal use items.
- Effective Accommodation. Employers are responsible to provide an effective accommodation, not the best or most preferred.
- Interactive Process. Employer and employee must engage in an interactive process.

# Scope of Duty



- Create a Position. No duty to create a position in order to accommodate a disabled applicant or employee. The only exception is the duty to assign a disabled employee to an already vacant position which he or she is qualified to perform.
- Known Disability. Duty of accommodation extends to a known disability of a qualified applicant or employee.
- Leave of Absence. Leave of absence as a reasonable accommodation – Required if reasonable and of a definite duration.

# EEOC Regulations - 2011



- What constitutes an actual disability or a “record of” a disability?
  - Reasonable accommodation issues
- When is an employee “regarded as” disabled?
  - Discrimination issues
- EEOC: the determination should not demand an extensive analysis.

# What Constitutes An Actual Disability?



- A physical or mental impairment . . .
  - that substantially limits . . .
  - one or more major life activities



# Physical or Mental Impairment



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

# Substantially Limits



- The impairment need not prevent, or significantly or severely restrict, the individual from performing the major life activity.
- The analysis is in comparison with most people in the general population.
- The term is construed broadly in favor of expansive coverage.

# Major Life Activities



- Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and
- The operation of any major bodily function (immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, musculoskeletal, and reproductive functions).

# Let's Add It Up . . . .



- A disability is:
  - A physical or mental condition that makes it more difficult for an individual to do something important or that impacts one of his or her major bodily functions in comparison to the general population.

## How Long Does It Have To Last?



- EEOC: There is no specific durational requirement.
  - Impairments that last less than 6 months can be disabilities.
  - Example: individual with back impairment that results in a 20-pound lifting restriction that lasts for several months is disabled.
  - “Impairments that last only for a short period of time are typically not covered, although they may be covered if they are sufficiently severe.”
- Impairments that are episodic are disabilities if they substantially limit a major life activity when active.

# Everything is a Disability



- Epilepsy
- Cancer
- Diabetes
- HIV
- Arthritis
- Migraines
- Multiple Sclerosis
- Blindness
- Deafness
- Cerebral Palsy
- Autism
- Muscular dystrophy
- Major depression
- Bi-polar disorder
- Schizophrenia
- Obsessive/compulsive disorder
- Asthma / COPD
- Heart disease
- Fibromyalgia
- Chronic fatigue disorder
- Attention deficit disorder / ADHD
- Narcolepsy
- Irritable bowel syndrome
- Severe allergies
- Others?

# Workers Comp Basics



- Is a system of compensation and bars negligence claims against employers
- Applies to injuries sustained at work
- Does not require employers to provide leave time
- Does not require employers to accommodate medical conditions



# Where Do the ADA, FMLA, and Workers' Compensation Overlap?





# Intersection #1: Is an FMLA SHC an ADA Disability or a WC Injury/Illness?



- FMLA Serious Health Condition
  - Illness
  - Injury
  - Impairment
  - Physical
  - Mental Condition (that involves in-patient care or continuing treatment by a healthcare provider)
  - Incapacity Means:
    - Inability to work
    - Attend school
    - Perform regular daily activities



# Intersection #1: Is an FMLA SHC an ADA Disability or a WC Injury/Illness?



- ADA
  - Disability
    - Physical / Mental disability that substantially interferes with a major life activity

● ● ● Intersection #1: Is an FMLA SHC an  
ADA Disability or a WC Injury/Illness?



- Workers' Compensation:
  - Injury / Illness
  - Arising out of course / scope of employment



## Intersection #1: Is an FMLA SHC an ADA Disability or a WC Injury/Illness?



- FMLA Serious Health Condition may not always be a disability under ADA
- ADA disability will probably be a Serious Health Condition
- If event occurred at work, it will be a WC event
- But you need to review this very carefully

# Best Practices Coordination / Compliance Strategy #1



- Count WC time as FMLA
- Evaluate at the front-end whether an FMLA condition is likely a disability under the ADA
  - Consider an interactive discussion to assist with better attendance
  - If leave is continuous, consider whether employee is likely to return after FMLA is exhausted



## Intersection #2: Substance (Drug) Abuse



- Under FMLA, substance abuse *may* be a serious health condition
- Drug abuse is not a disability under the ADA
- Line is still blurred between requests for time off under FMLA to address substance abuse and termination for substance abuse
- Complication – Medical Marijuana
  - Medical Marijuana taken to reduce impact of disability
  - Leads to WC injury
  - Advance employee notice to HR
  - No RTW until test clean



## Best Practices Coordination / Compliance Strategy #2



- Determine protocol for request to take leave for drug / alcohol dependency
- Establish clear notice requirements
- Try to create a system of communication

## Intersection #3: FMLA Has Adopted ADA Language



- The definition of “incapacity” under the FMLA (unable to perform one or more of the essential functions of the position) uses ADA definition
- FMLA allows an employer to give health care provider essential functions of position
- Employer able to get health care provider to indicate which essential functions employee unable to perform



## Best Practices Coordination / Compliance Strategy #3



- You better have effective / up-to-date job descriptions
- “Day in the Life” option
- FMLA certification forms can be helpful in ADA analysis

## Intersection #4: Medical Certification



- FMLA
  - FMLA provides for medical certification using the healthcare certification form
  - Second & third opinions
  - Re-certifications
- ADA
  - The ADA does not provide a specific form to get an independent medical exam
  - Medical exams permitted
  - Uniformly applied
  - Consistent with business necessity (narrowly tailored)
  - To determine reasonable accommodation



## Intersection #4: Medical Certification



- Workers' Compensation
  - IME
  - Main goal is determine whether work or non-work related



## Best Practices Coordination / Compliance Strategy #4



- Coordinate ADA, WC, & STD medical information
- Use the information appropriately
- Maintain the information as confidential

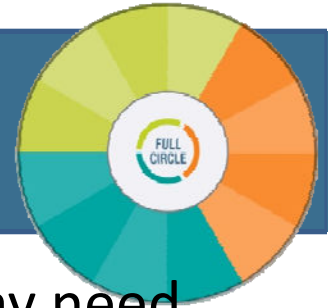


## Intersection #5: Terminate or Accommodate?



- FMLA leave entitlement is 12 weeks
- Reinstatement to position held
- No specific timeframe stated under ADA
- EEOC takes the position that reinstatement must be made to the identical position
- Under ADA must show undue hardship to avoid this obligation
- WC – no retaliation

# A Leave Can Be A Reasonable Accommodation



- According to the EEOC: An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to:
  - Obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
  - Recuperating from an illness or an episodic manifestation of the disability;
  - Obtaining repairs on a wheelchair, accessible van, or prosthetic device;
  - Avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis)



**May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?**

**No.**

## EEOC's Enforcement Guidance



- **No.** If an **employee** with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that:
  - (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship.
- *Modifying workplace policies, including leave policies, is a form of reasonable accommodation.*



# Red Flags



- Automatic Termination
- Leave policies that automatically terminate employment without engaging in the interactive process to determine:
  - Whether there are accommodations that would allow the employee to perform the essential functions of the job and/or
  - Whether additional leave might be a reasonable accommodation



# Red Flags



- 100% Healed
- Leave policies that require return to work only when the employee is “100% healed”
- Leave policies that do not assess the situation on an individual basis

# A Good Leave Policy



- Is flexible
- Does not automatically terminate employment at the end of a predetermined period
- Mandates communication with the employee
- Includes an HR evaluation of the situation prior to termination
- Does not allow indefinite leave

# Best Practices



- Your leave policy should
- Set markers for review at 12 weeks; 6 months; 9 months; 12 months
  - Ask the following questions:
    1. Expected RTW date?
    2. Employee reach MMI?
    3. Any current or permanent restrictions?
    4. Any input regarding whether there is a reasonable accommodation to enable RTW to perform essential job functions?

## What Is Indefinite?



- **Do employers have to grant indefinite leave as a reasonable accommodation to employees with disabilities?**
- **No.** Although employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration

# What Is Indefinite?



- Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations.
- Indefinite leave is different from leave requests that give an approximate date of return (e.g., a doctor's note says that the employee is expected to return around the beginning of March) or give a time period for return (e.g., a doctor's note says that the employee will return sometime between March 1 and April 1).
- If the approximate date of return or the estimated time period turns out to be incorrect, the employer may seek medical documentation to determine whether it can continue providing leave without undue hardship or whether the request for leave has become one for leave of indefinite duration.

# Example



- An employer's policy allows employees one year of medical leave but then requires either that employee return (with or without reasonable accommodation, if appropriate) or be terminated.
- An employee with a disability who has been on medical leave for almost one year informs her employer that she will need a total of 13 months of leave for treatment of her disability and then she will be able to return to work.
- She provides detailed medical documentation in support of her request.



1. NOT an indefinite leave
2. Employer must grant unless undue hardship
3. Modify policy required as reasonable accommodation



# Example



- The employer leave policy says termination at 12 months.
- An employee with a disability has been on medical leave for one year.
- He informs his employer that he will never be able to return to his old job due to his disability.
- He is unable to provide information on whether and when he could return to another job that he could perform.
- The employer may terminate this worker because the ADA does not require the employer to provide indefinite leave.

# Example



- An employer grants 12 weeks of medical leave at the request of an employee with a disability.
- At the end of this period, the employee submits a note from his doctor requesting six additional weeks.
- The employer grants.
- At the conclusion of this period, the employee submits a new note seeking another six weeks of leave
- This brings the employee's total leave to 24 weeks.

# Example



1. Employer concerned regarding extensions
2. Employer requests medical from doctor to confirm why can't be more accurate
3. What is MMI
4. Why believe 6 weeks more will be sufficient

# Example Conclusion



1. Doctor response
  - Complications
  - Unsure when able to RTW
  - Current condition does not permit clear answer
2. Employee request has become indefinite
3. Undue hardship
4. Employer may terminate

## Best Practices Coordination / Compliance Strategy #5



- Do not automatically terminate when FMLA time exhausted
- Do not automatically replace an employee when FMLA time is exhausted
- Individual analysis is required
- Key evaluation
  - Does the employee know if, and when, he or she will be able to return to work?

## Intersection #6: Fitness for Duty Examination



- FMLA Regulation §825.312
- Fitness for duty exam is permitted if uniformly applied
- Under FMLA, the employer may ask the health care provider to certify the employee is able to perform the essential job functions
- §825.312(b)
  - To require fitness for duty exam
  - Must include essential job functions
  - With Designation Notice &
  - Indicate will seek fitness for duty RTW exam

## Intersection #6



- FMLA specifically states in §825.312(h) that the ADA requirements are applicable
- An ADA medical examination must be job related and consistent with business necessity
- “If an employee’s serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.”
- WC – Fitness for Duty & IME



## Best Practices Coordination / Compliance Strategy #6



- Medical information is the key to reasonable accommodation, particularly for mental impairments
- But employers must be sure to follow procedural limitations.
- FMLA – certification forms
- ADA – must be narrowly tailored and consistent with business necessity





## Intersection #7: Interactive Process



- The ADA requires an interactive process for reasonable accommodation discussion
- The FMLA makes it necessary for employers to track dialogue – call-ins, text messages, emails

## Best Practices Coordination / Compliance Strategy #7



- Your new questions should be:
  - What else can I do to help the employee RTW?
  - Is this employee likely off work indefinitely?
  - NOT– How long do I have to wait to terminate?
  - Must document interactive dialogue



## Intersection #8: Return to Work



- FMLA – Cannot require RTW until 12 weeks exhausted
- ADA – RTW if able to reasonably accommodate
- WC – RTW to restricted duty



## Best Practices Coordination / Compliance Strategy #8



- If using restricted duty work, better send a letter confirming exceeding ADA reasonable accommodation obligation
- Or you have created a new reasonable accommodation option

# Restricted Work



- Restricted Work– Things to Consider
  - What benefit(s) will be achieved by offering restricted work?
  - Is the restricted work valuable?
  - Do I want this employee back in the workplace?
  - How long should the restricted work last?
  - What happens if the employee never recovers enough to return to their former position?



# Questions



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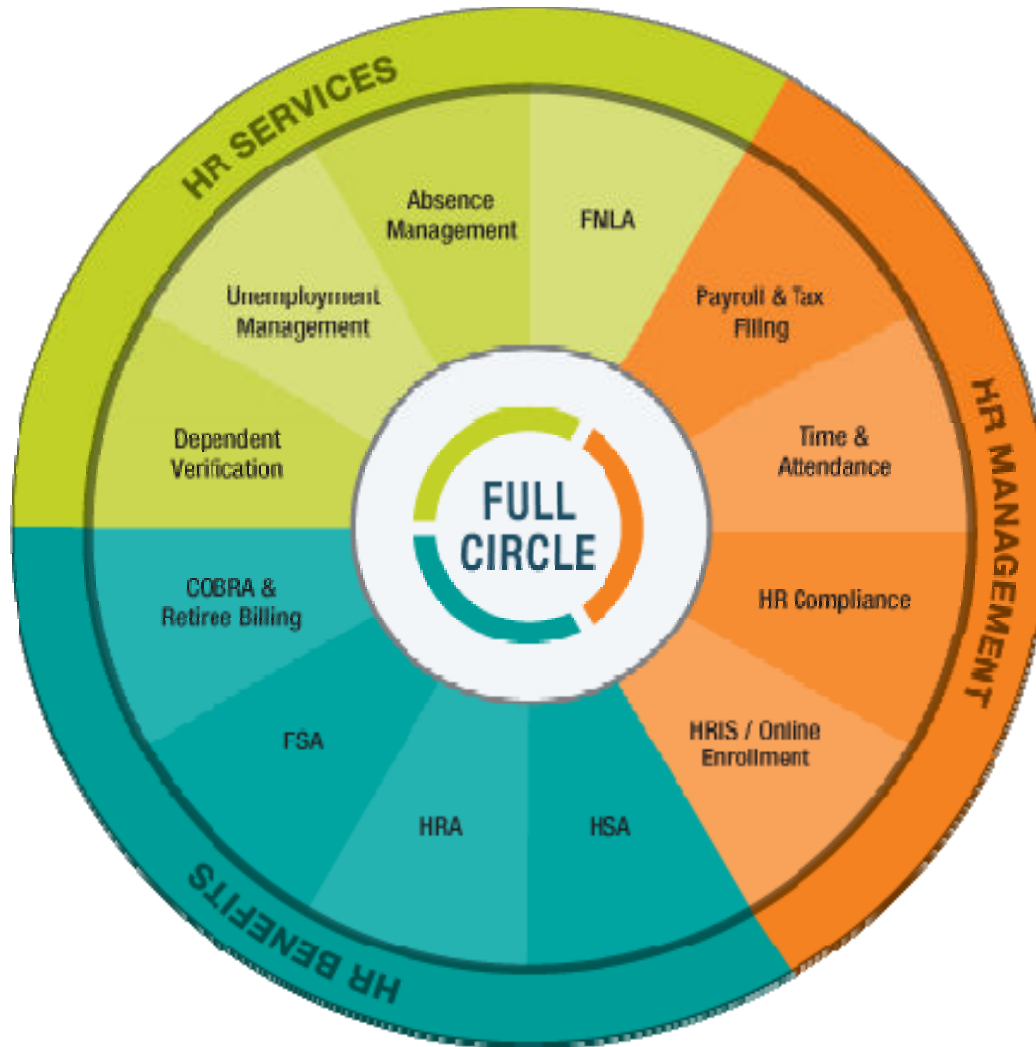
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