



# Real Strategies and Solutions to Intermittent FMLA Leave

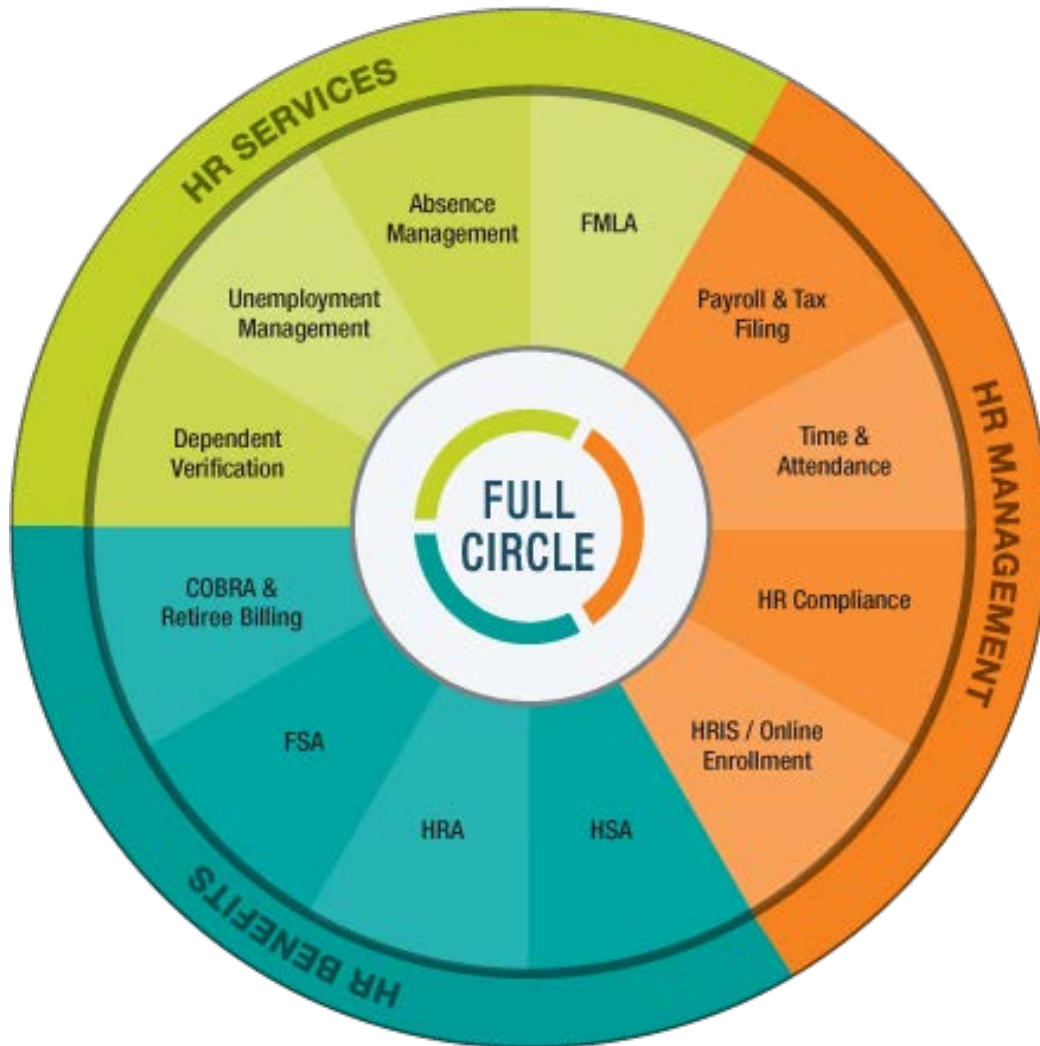
Sarah K. Willey



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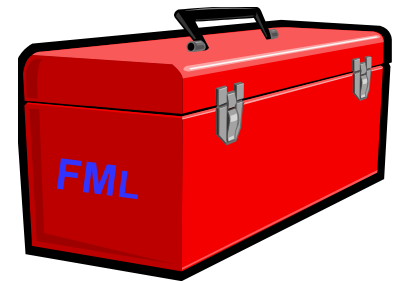
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# How Full Is Your Tool Box?



## Strategies for Managing Intermittent Leave

1. Make sure the eligibility requirements are met every time a new leave is granted
2. Use the certification procedure to your advantage
3. Have a set call-in procedure
4. Properly track and count time missed
5. Be aggressive with fraudulent use of FMLA leave



# Strategy 1: Eligibility Requirements



- 1250 hours in the past 12 months
  - Actual time worked
  - FMLA leave does not count
- 12 total months of employment
- Determined at the commencement of the leave

# Case Studies - Jason



- Jason is an engineer and has been employed for 10 months.
- 2 years ago, Jason also was a summer intern during College.
- Jason injures his knee playing flag football and needs to miss 4 weeks of work for surgery.
- Is his time off work covered by the FMLA?

# Case Studies - Jason



- Jason returns to work from his surgery. However, Jason expects that he might need to periodically miss work for continued knee pain.
- Does the FMLA apply to those absences?

# The “Pre-emptive Strike” Certification



- An employee’s submission of a certification that is not in connection with an absence
  - Usually to “set up” intermittent leave for a chronic condition
- This strategy is not authorized by FMLA
  - This certification should be rejected in writing and returned to the employee



# Eligibility Requirements



- According to the DOL, eligibility must be satisfied
  - At the commencement of each leave
  - At the commencement of each leave year

# Case Studies - Jason



- In October, Jason is approved to take FMLA leave for his knee pain. He also misses two months of work over the winter due to a hockey injury. During the summer, he sprains an ankle and misses more time.
- Are those absences covered by the FMLA?

# Eligibility Requirements



- At the commencement of each leave
  - Once intermittent leave is approved, it is a single leave
  - The employer cannot require the employer to re-establish eligibility for each absence
  - If an employee requests leave for a different reason, eligibility must be satisfied

# At the commencement of each leave year



- Eligibility lasts through the 12 month period designated by the employer
  - Calendar
  - Rolling backward
  - Looking forward
- Rolling backward
  - Eligibility is re-calculated as of the first absence for the condition after the 12-month period has ended (DOL Opinion Letter FMLA 112 (9/11/00))

# Case Studies - Jason



- The following October, Jason is still missing time for his knee pain.
- Is there anything the Company can – or should – do?

## Strategy 2: Use Certification Procedure to Your Advantage



- The original certification
  - Use a certification form that has been tailored to address intermittent leave
  - Carefully evaluate the cert form
    - Intermittent leave must be “medically necessary”
    - Medical need must be “best accommodated” through intermittent leave

# Case Studies - Suzanne



- Suzanne is close to discharge for attendance.  
She comes into HR one day and asks how to apply for FMLA to care for her grandmother with Alzheimers.
- What do you tell her?



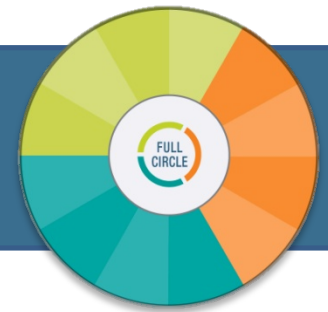
# Family Member



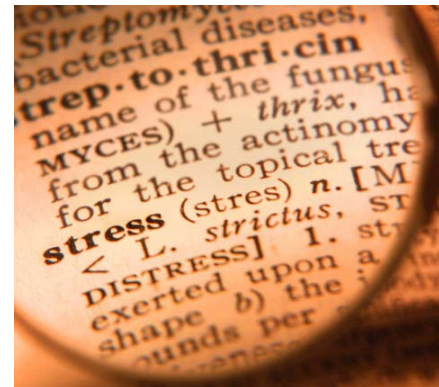
- “Spouse, child or parent”:
  - “Spouse”: does not include significant others
  - “Child”: includes adopted, foster and stepchild, legal ward, or child of person standing in place of parent (has day-to-day responsibility for care and financial support)
    - Must be under 18 years of age, unless child is incapable of self-care because of a mental or physical disability
  - “Parent”: does not include in-laws, but does include person standing in place of a parent



# Case Studies - Suzanne



- Suzanne responds that she would then like FML for herself because her grandmother's condition is actually making her feel stressed
- What do you do?

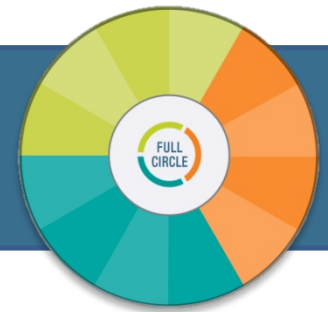


# Case Studies - Suzanne

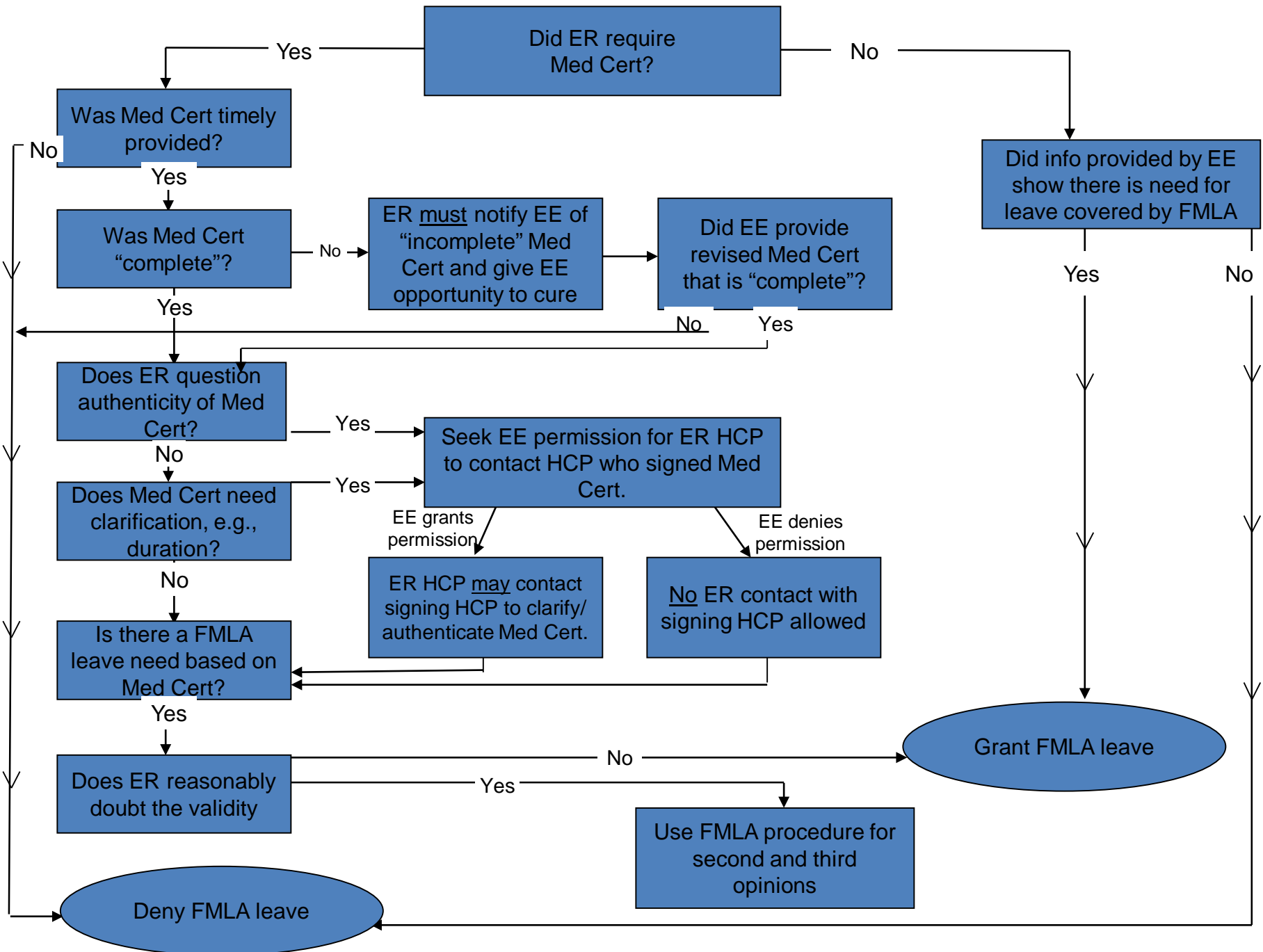


- Suzanne returns the medical certification form completed by the family doctor
- Several sections of the form are not completed
- The sections that are completed say the Suzanne has a chronic condition and that the duration of her condition is unknown.
- Do you accept the form?

# Case Studies - Suzanne



- The form is:
  - Incomplete
  - Unclear as to whether Suzanne has a chronic condition
  - Unclear as to whether (and why) Suzanne needs to miss work



# Medical Certifications



- Certification must be complete
  - Complete means that all relevant portions are fully completed
  - Incomplete certifications do not meet the employee's obligation
  - Give the form back to the employee, identify the deficiency, and set a new date for the completed form to be returned – in writing

# Case Studies - Suzanne



## ■ Next Steps:

- Step 1: Return the form to Suzanne to have doctor complete it
- Step 2: Possible clarification
- Step 3: Possible second opinion



# Medical Certifications – Authentication/Clarification



- Authentication / Clarification process
  - Must have permission from employee (use the certification form)
  - Use a health care provider to clarify / authenticate cert
  - Establishing relationships with health care providers for this purpose is very valuable
  - Make sure the employer's health care provider fully understands the concerns with the certification

# Medical Certification – Second & Third Opinions



- Reason to doubt the validity of the need for leave
- Goal might be to narrow the scope of intermittent leave (e.g., unlimited / unknown need to once every month)
- At the employer's expense
- Carefully choose a provider
  - Cannot be provider with whom the employer regularly contracts
  - There is nothing unlawful about asking those providers for referrals



# Medical Certification – Second & Third Opinions



- Speak with the provider
- Use a customized certification form
- Provide a copy of the initial certification, letter explaining why the employer doubts the validity of the certification and any other relevant documentation (e.g., attendance records)
- Employee's non-compliance with second opinion process is grounds for denial

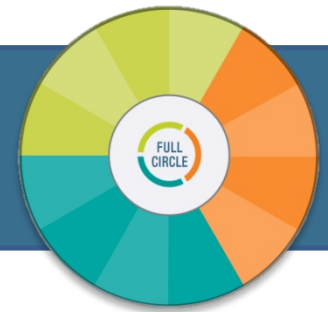
# Case Studies - Suzanne



You decide to customize a cert form for Suzanne

- What do you want to include?
  - Chronic condition:
    - (1) Requires treatments,
    - (2) Continues over extended period of time, and
    - (3) May be episodic
  - How condition makes Suzanne unable to work and perform other activities

# Case Studies - Suzanne



- Customized cert form for Suzanne (cont.)
  - How long condition will last
  - Whether there is a medical need for intermittent leave
  - How frequently will she be incapacitated (particular days and shifts)
  - How long will each incapacity last

# Recertifications



- Obtain a re-certification if:
  - The circumstances of the leave have changed (e.g., a change in frequency or duration of absences, or in the condition itself); or
  - Information casts doubt on the employee’s stated reason for an absence.
  - Every 6 months
- Often unhelpful because the employee’s health care provider submits the same information, and a second opinion is not available

# New Certifications



- A new certification can be required:
  - Yearly, or
  - For a new condition.
- Re-establish eligibility
- Second and third opinion process available

# Strategy 3: Have a Set Call-In Procedure



- Written policy
  - Require notice of absence within certain period of time
  - Require notice for each day of absence

# Call-In Systems



- Centralized system with trained personnel
  - For ALL time off work (even if leave early)
  - Specific reason for the absence – “sick” is not enough
  - When employee expects to return
  - Whether employee has been taken off work by a healthcare provider (if so, for how long)
  - Whether employee has seen a health care provider
  - Whether employee is on medication

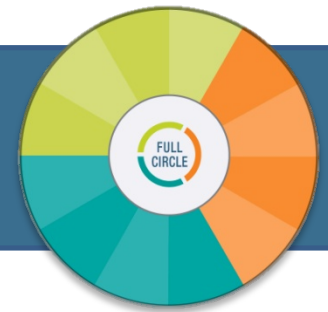
# Example



- Denise Pellegrino is employed by the CWA and was given copies of the FMLA and sick leave policies.
- In October, Pellegrino takes FMLA leave for a planned surgery. Her leave is to last four weeks.
- About two weeks after the surgery, she and 3 friends travel to Cancun for a week. Pellegrino does not notify the CWA of the trip.
- But someone else does.



# Example



- CWA meets with Pellegrino after she returns, and she admits to traveling during her leave. She is fired.
- Claim: The CWA interfered with my rights under the FMLA.
- Response: We had a legitimate reason to terminate your employment – you admittedly violated our sick leave policy.



# Example



- Court: The CWA is correct, noting:
  - The sick leave policy was not inconsistent with the FMLA.
  - Pellegrino received a copy of her Notice of Eligibility & Rights and Responsibilities (WH-381), which told her that she would be required to use sick leave.

# Example



- Here another example of a call-in rule that another court found lawful:
  - If you must be late for work or absent because of illness or for an unforeseen circumstance, personally notify your appropriate manager or immediate supervisor as soon as possible by telephone....*
  - If you are not at work during your regular hours, you must be on authorized leave. This means that your supervisor knows of and has approved your absence. In accordance with the law and rules, job abandonment occurs when an employee is absent from work without approval for three consecutive workdays or two consecutive workdays following the expiration of any authorized leave.*

# Call-In Systems



- Consider automated systems
- Consider a system by which reason for absence is objectively recorded

# Case Studies – Suzanne (again)



- Suzanne returns the completed cert form
- It states that her chronic condition is stress and that she is intermittently unable to work and perform other activities due to her stress
- Her family doctor has referred her to a psychologist for treatment
- She is expected to miss approximately 2-3 days per month, on no particular days or shifts

# Case Studies - Suzanne



- The following Wednesday, Suzanne calls the team leader. The team leader's notes state that Suzanne is taking "FML."
- She does the same thing on the subsequent three Wednesdays

April 2007							Suzanne
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	
1a	2a	3a	4a FML	5a	6a	7a	
8a	9a	10a	11a FML	12a	13a	14a	
15a	16a	17a	18a FML	19a	20a	21a	
22a	23a	24a	25a FML	26a	27a	28a	
29a	30a	a	a	a	a	a	

# Case Studies - Suzanne



- The following day after the most recent call in, the manager notices the pattern and asks the team leader about the calls
- The team leader responds that Suzanne had called and said that she was taking FML to care for her grandmother
- You speak to Suzanne, who claims that when she called, she was crying and also told the team leader that she was stressed by the situation

# Case Studies – Suzanne



- How could this have been prevented?



## Strategy 4: Properly Track & Count FMLA Time Used



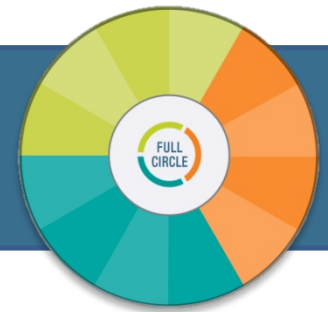
- Trained supervisors
- Scheduling foreseeable leave
- Correct calculation of leave used

# Trained Supervisors



- Notice under the FMLA
  - Prior to approval: enough information to put the employer on notice that the leave might qualify under the FMLA
  - After approval: specifically state medical condition or FMLA
- Supervisors must have the ability to recognize FMLA absences
- Training is essential

# Qualifying Reason For Leave



- FMLA red flags

- An employee calls in sick for more than 3 days
- An employee is admitted overnight to a hospital or other medical care facility
- An employee repeatedly misses work for the same health condition
- An employee misses work to care of a spouse, parent or child
- An employee tells you that she is pregnant
- An employee tells you that s/he has a permanent or long-term condition such as cancer or Alzheimers

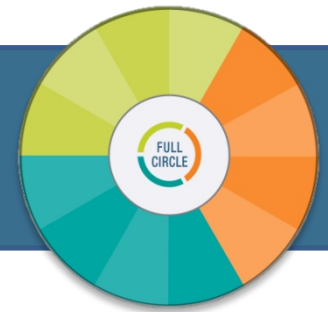


# Scheduling Foreseeable Leave



- Employees needing intermittent leave must attempt to schedule it so as not to disrupt the operations.
- Ideally, during non-work hours
- Most effective with treatment

# Calculating Intermittent Leave



## How Much to Put into the Bank?

- Common mistake = assuming that all employees work 40 hours per week
- The amount of leave available is 12 weeks
- If an employee normally works 20 hours per week, the employee is entitled to 240 hours of FMLA leave every 12 months

# Calculating Intermittent Leave



## How Much to Take Out of the Bank?

- Calculating intermittent leave
  - Fraction of weeks
  - If employee works a part-time schedule or variable hours, compare new schedule with normal schedule
  - If employee's hours vary from week to week, use weekly average of hours worked over the 12 weeks prior to the beginning of the leave period

# Case Studies - Jane



Jane is a full-time employee who normally works 40 hours per week. She has asked to reduce her schedule to 30 hours per week due to her MS.

- How much leave does she use each week?
- When will she exhaust her 12 weeks?
- What if she also began taking additional intermittent leave?

# Case Studies - Chip

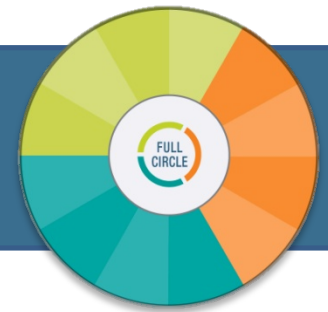


Chip's schedule varies from week to week. Some weeks, he works quite a bit of overtime. Other weeks, he may only work 20 hours or so. He has now requested intermittent leave to care for his son with asthma.

- How much leave is Chip entitled to take?
- How will you calculate his intermittent usage?



# Strategy 5: FMLA Fraud



- Fraudulent use of FMLA leave is unprotected.
- FMLA does not prohibit investigation of an employee's activities while using FMLA leave.
- Intermittent leave is FMLA-protected only if it is medically necessary.
- "Family member" leave is authorized only "to care for" that person.
- "New child" leave is only for birth, placement, or "to care for the newborn child."
- Other uses are not FMLA leave, and may be fraudulent.

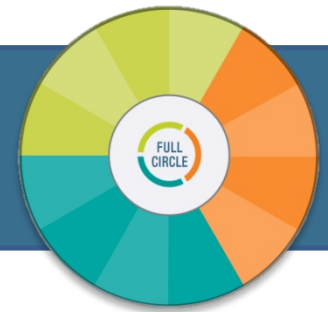
# FMLA Fraud



- To defend an employment decision based on FMLA fraud, the employer must show that it had *an honest suspicion of FMLA fraud*.
- On what evidence might an employer rely?
  - Rumor
  - Admission by employee
  - Documentation

# Case Study

## What is an Honest Belief?



- Gwendolyn Donald is an assistant manager at an Arby's restaurant.
- Donald suffers from a number of health problems for which she takes intermittent FMLA leave.
- Arby's suspects that Donald is improperly entering customer orders in order to steal cash from the register.
  - Her supervisor has noticed that she initially charges customers full price but then orders are changed to a discounted price. Also, her drawer is \$4 or \$5 short.
  - Her supervisor listens to her orders and compares the orders she took to the figures in her register.
  - It appears that Donald is improperly discounting the orders and pocketing the difference.

# Case Study

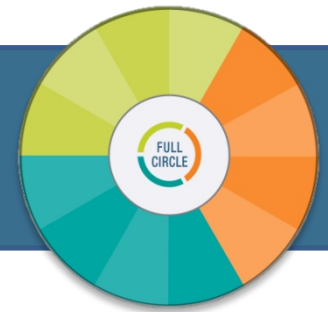
## What is an Honest Belief?



- After the investigation but before Donald is confronted, Donald misses work for reasons covered by the FMLA.
- Upon her return, Arby's confronts Donald.
- She denies all allegations of theft but is fired anyway.

# Case Study

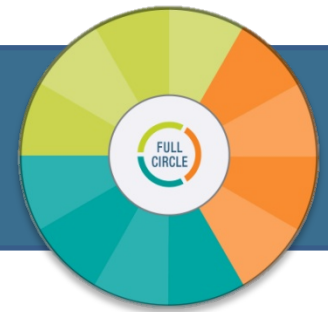
## What is an Honest Belief?



- Donald's FMLA claims:
  - I was fired because I took FMLA leave.
  - Arby's interfered with my rights to take FMLA leave and to return to work.
- Court: Arby's can defend against both if it can prove a legitimate reason for firing Donald.
- Court: Arby's successfully articulated an "honest belief" that Donald pocketed money. FMLA claims dismissed.

# Case Study

## What is an Honest Belief?



- Tom Seeger has is a network technician for Cincinnati Bell Telephone Company.
- Seeger is diagnosed with a herniated lumbar disc on Sept. 5. He remains off work on FMLA (with paid benefits per union contract) through Sept. 24. After Sept. 24, he is on unpaid FMLA leave until he returns to work on Oct. 16.

# Case Study

## What is an Honest Belief?



- On Sept. 23, at least four of Seeger's co-workers see him at the Cincinnati Oktoberfest.
- Some believe that he has no difficulty walking, while at least one says that he seems to be in pain.
- CBT interviews and obtains sworn statements from two co-workers who claim they saw Seeger at the festival.
- When Seeger returns to work on Oct. 16, he is suspended. He submits a letter from his doctor stating that walking for a few hours does not equal "working for an eight hour day."
- Seeger is fired anyway.

# Case Study

## What is an Honest Belief?



- Court: CBT proved that it had an honest belief that Seeger committed fraud.
- Important factors:
  - Seeger represented to CBT that he experienced “excruciating pain,” an inability to sit, stand, or walk for long periods of time.
  - Seeger’s doctor did not clear him even for restricted work.
  - Seeger was observed interacting with co-workers and walking seemingly without pain.
  - CBT conducted a thorough investigation.
  - CBT gave Seeger an opportunity to provide additional documentation and information.



# Case Study

## What is an Honest Belief?



- Daryl Scruggs is a production employee at Carrier Corp.
- Scruggs is granted intermittent FMLA leave to take his elderly mother to doctors' appointments.
- On July 24, 2007, Scruggs informs Carrier that he needs the entire day off for FMLA leave.
- Carrier hires a private investigator, who stations himself outside Scruggs' driveway. Scruggs' car never leaves.
- What should Carrier do?

# Case Study

## What is an Honest Belief?



- Carrier gave Scruggs an opportunity to explain.
- Stumbling at first, he eventually developed a convoluted story by which he left his house via the backdoor, rode to his mother's nursing home with his brother and returned via a neighbor's house.
- Scruggs could not remember his neighbor's name when asked.
- Scruggs did submit documents showing that he picked up his mother that day and took her to an appointment, but Carrier found them to be suspicious.
  - The sign-out sheet at the nursing home said that he picked up his mother at 11:30, but the doctors note said that the appointment was at 10:30.
- Carrier did not believe Scruggs and fired him.

# Case Study

## What is an Honest Belief?



- Claim: Carrier interfered with my right to take FMLA leave.
- Defense: You do not have any right to misuse FMLA leave, and we can fire you for dishonesty.
- Court: Carrier established an honest belief that Scruggs was lying.

# Case Study

## What is an Honest Belief?



- Diandra Gurne is a call center employee for Michigan Bell.
- Gurne is certified to take intermittent FMLA leave for migraines, depression and anxiety.
- On April 10, Gurne does not feel well and, assuming that it is from her medications, calls into work and takes FMLA leave. Gurne was scheduled to work until 5 pm that day.

# Case Study

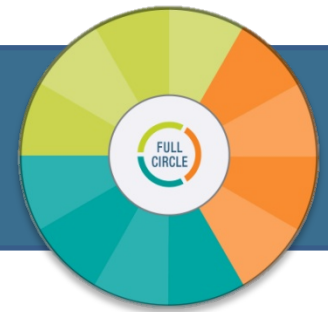
## What is an Honest Belief?



- Gurne rests throughout the day. She feels a little better, but her symptoms continue on and off.
- That evening, Gurne makes the questionable decision to attend a birthday party for a co-worker's husband.
- The following day, a co-worker (Hasler) reports having seen Gurne at the party between 4:30 and 6:30 pm – and puts in it an email to the manager.
- What should Michigan Bell do?

# Case Study

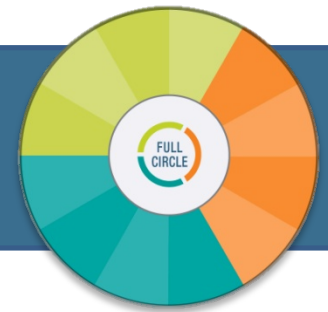
## What is an Honest Belief?



- An investigation was conducted. Three employees who were at the party, as well as Gurne, were interviewed.
- Gurne stated that she was home until 5:30 pm and that Hasler arrived at the party around 6:15.
- No other employees were able to confirm when Gurne arrived at the party, although one said that Hasler did arrive after Gurne.
- Gurne is terminated.

# Case Study

## What is an Honest Belief?



- Claim: Michigan Bell both interfered with my right to take FMLA leave and also retaliated against me.
- Defense: We honestly believed that you were dishonest.
- Court: Not so much. Let a jury decide.
  - Michigan Bell failed to make a reasonably informed decision.



- Example of real life Facebook postings:
  - “Ok, way 2 much time off work, I’m bored!!! Who wants 2 hang out or go out 2nite? I’m ready !!”
  - “Had a great wkend, job interview in the morning, then to visit my mom, and maybe a bike ride.”





- FMLA Policy
  - Prohibit any FMLA absence for reasons not stated in the documentation
  - Prohibit any activity that is inconsistent with “incapacity” (e.g., travel, vacations, bar)
    - See certification form for information related to employee’s incapacity
  - Prohibit outside employment
- Consider surveillance

# Case Studies - Sally



- Step 1: review certification form
  - Scope of need for leave?
  - Information about frequency and duration?
- Consider recertification/new certification
- Investigate, including speaking with employee
- Surveillance
  - Note: surveillance is particularly effective for leave to care for family members



# Questions



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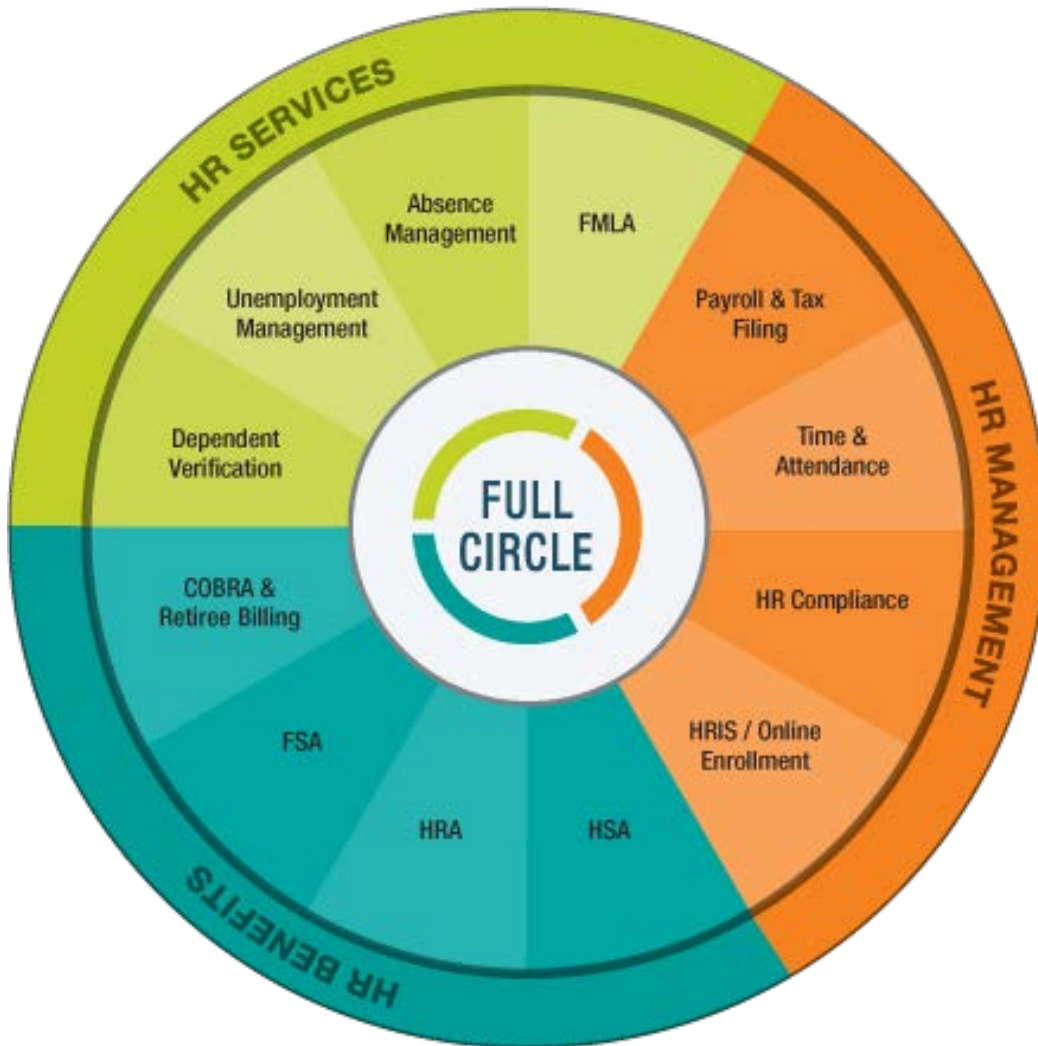
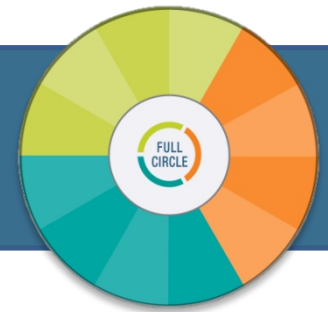
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