



The Fundamentals of FMLA Leave

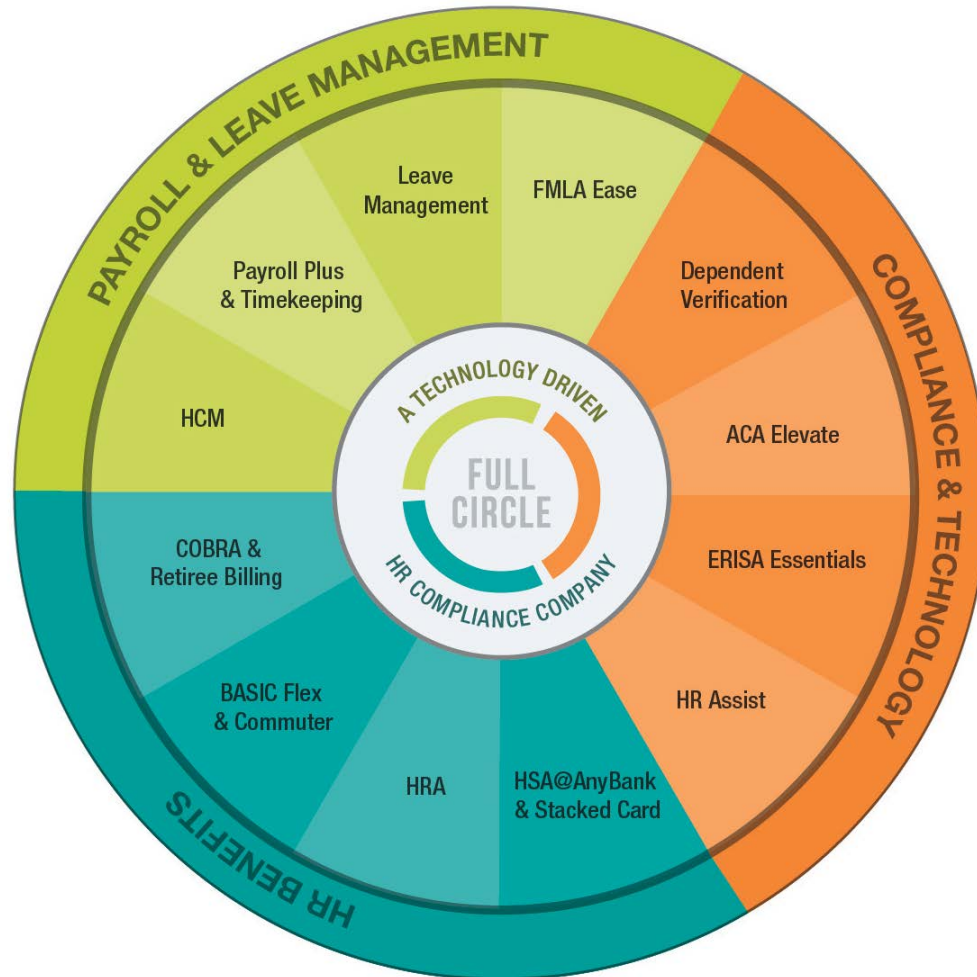
Presented by: Sarah K. Willey



- HR Benefits
- HR Management
- HR Services

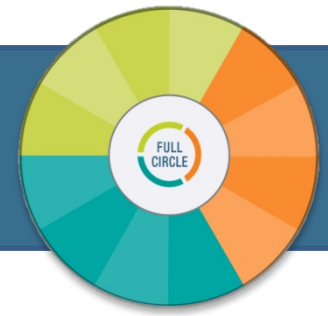
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- Today we will help you understand the basic components for FMLA
- FMLA is part of a larger disability management process
- Today's focus is FMLA

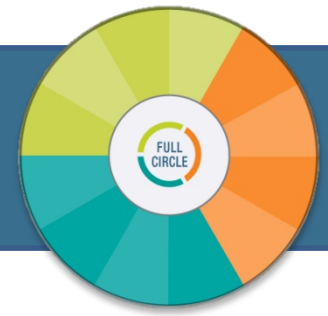
Balloons – The Visual



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



FMLA Fundamentals



- Imagine a game of tennis
- Inference claims – must know the rules
- Notice requirements critical
- Paperwork intensive
- Education of management critical

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)

FMLA Fundamentals



- Are you a covered employer?
- Is the employee eligible?
- What is a serious health condition?
- How much leave is an employee entitled to?
- What paper work must be completed?
- What triggers the FMLA process?
- Does an employee have to ask for FMLA leave by name?

FMLA QUIZ



- An employee on a STD/LTD leave is not on an FMLA leave

FMLA QUIZ



- An employee on a workers' compensation leave is not on an FMLA leave

FMLA QUIZ



- An employee must specifically request an FMLA leave to be eligible

How Much Leave is Available?



- Twelve weeks of leave in whole / part
 - 26 weeks for leave to care for injured service memembr
- Unpaid (under FMLA)
- Workweek equals employee's normal workweek
- Twelve Month Period
 - Calendar
 - Fiscal
 - Rolling Backward

What Types of Leave Are Required?



- Employee's own serious health condition
 - Includes pregnancy
- A family member's (parent, spouse, child) serious health condition
- Military family leave
- Bonding time to care for newly born or newly adopted child
- Leave needed because a family member is deployed to military service

Step 1: Policy and Forms



- FMLA Notice Posting
- FMLA policy
- Notice forms
 - Notice of Eligibility and Rights & Responsibilities
 - Designation Notice
- Medical Certification forms
 - Employee's own serious health condition
 - Family member's serious health condition
 - Certification of qualifying exigency
 - Certification of serious injury or illness of a current service member – for military family leave



Step 2: Eligibility



- An employee is eligible for FMLA if he/she:
 - (1) has worked a total of 12 months,
 - (2) has worked 1,250 hours in the past 12 months, and
 - (3) works at a site with at least 50 employees within a 75 mile radius of the employee
- This is calculated as of the date the employee begins leave
- The payroll test applies

Eligibility



- For the purpose of counting the 12 months:
 - ALL time employed within the prior 7 years counts, using the payroll test
 - Time spent working for the employer through a temp agency counts
- For the purpose of counting the 1250 hours:
 - Only hours actually worked count
 - Time spent working through a temp agency counts



Tip



- Remember other obligations if employee is not eligible for FMLA leave
 - Policies
 - CBAs
 - ADA/state disability laws

Step 3: Notice



- To trigger a right to take FMLA leave, an employee must provide notice
- The standard for “notice” is different, depending on whether or not the employee is already certified to take FMLA



Notice – New Leave



- If an employee is not yet certified and has given the employer enough information that the employer should know the absence might be covered by the FMLA, the employee has provided notice under the FMLA. (It does not matter if the employee did not request FMLA or even say “FMLA.”)
- **NOTE:** this means that it is critical to recognize qualifying reasons for leave
- **NOTE:** this means it is critical to train supervisors / managers about FMLA serious health conditions

Notice – Leave Certified



- Once the employer approves a request for FMLA leave, the employee must specifically reference the need for FMLA leave (or the health condition) when calling in an absence
- Example: This is Jeff – Calling off FMLA self / depression
- In addition, the employee can be required to follow the usual and customary call-in procedures

Call-in Guidelines



- Call-in rules can be enforced
- Questions can be asked:
 - 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 has been prescribed medication for the condition

Timing of Notice



- Employee notice of a need for **unforeseeable** FMLA leave
 - Notice must be provided as soon as practicable
 - Employers can take into account availability to cell phones, texting, etc.
- Employee notice of a need for **foreseeable** leave
 - 30 days, unless not practicable, in which case notice must be given as soon as practicable

Step 4: Leave Availability



- In most cases, 12 weeks in leave year
 - 26 weeks to care for an ill/injured service member
- Leave year
 - Rolling backward
 - Rolling forward
 - Fiscal
 - Calendar



Rolling Backward



- Leave request on 1/25/18
- Look back to 1/25/17
- How much FMLA time available
- Will depend on how much time has already been used
- Time will roll off the back of the one year period

Leave Availability



- Most employers convert weeks to hours
- Conversion must be based on the employee's normal scheduled hours
- If there is no “normal schedule,” use the weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period



Tip



- Remember other obligations if employee exhausts FMLA entitlement
 - Policies
 - CBAs
 - ADA/state disability laws

Serious Health Condition



- Medical certification forms provide necessary information regarding:
 - Dates of incapacity
 - Dates of treatment
 - Impact on essential job functions
 - Planned medical appointments
 - Predicted flare-ups

Serious Health Condition

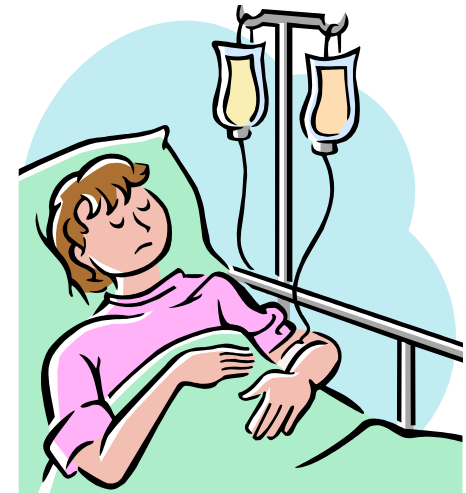


- Types:
 - Inpatient care
 - Absence plus treatment
 - Pregnancy
 - Chronic conditions
 - Long-term conditions
 - Multiple treatments
 - Substance abuse

Inpatient Care



- Overnight Stay- defined as a 24 hour stay in
 - Hospital
 - Hospice
 - Residential medical care facility



Absence Plus Treatment

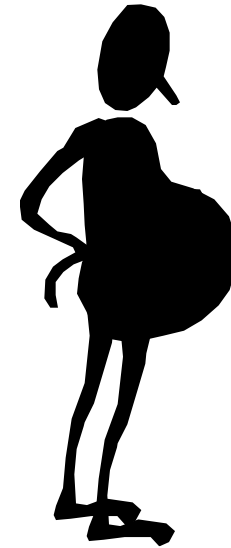


- More than three (3) consecutive calendar days incapacitated PLUS:
 - Treatment two (2) times by a health care provider
 - First visit to health care provider within 7 days of first incapacity
 - Second visit to health care provider within 30 days of first incapacity
- OR
 - Treatment one (1) time by a health care provider within 7 days of first incapacity and a continuing treatment regimen

Pregnancy



- Includes time off for
 - Planned appointments
 - Incapacity due to pregnancy



Chronic Conditions



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

Examples



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



Long-Term Conditions



- 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

Substance Abuse



- 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



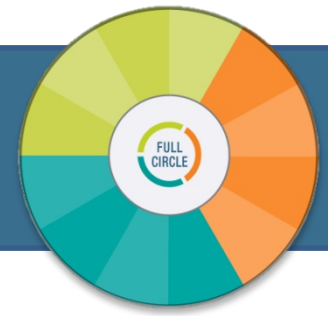
- Substance Abuse
- FMLA applies only if treatment is provided by a health care provider, or on referral by a health care provider
- Notice and communication issues common

Family Member



- Parent, Spouse & Child
 - Spouse: a person to whom the employee is legally married; does not include significant others. Can include same sex marriage and common law marriage.
 - “Child”: includes adopted, foster and stepchild, legal ward, or child of person standing in place of parent (has day-to-day responsibility for care or 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

Adult Child



- Adult Child
- Son / Daughter includes:
 - Biological
 - Adopted
 - Foster care
 - Stepchild
 - Legal ward
 - In loco parentis

Adult Child



- And, either:
 - Under 18 years of age or
 - 18 or older and incapable of self-care because of a mental or physical disability (as defined by the ADA)
 - Incapable of self-care means:
 - Active assistance or supervision
 - To provide daily self care
 - In 3 or more Activities of Daily Living (ADL's)
 - Or 3 or more Instrumental Activities of Daily Living (IADL's)

Adult Child



- ADL's include:
 - Grooming
 - Hygiene
 - Bathing
 - Dressing
 - Eating

Adult Child



- IADL's include:
 - Cooking
 - Cleaning
 - Shopping
 - Paying bills
 - Taking public transportation
 - Using telephones
 - Maintaining a residence

Qualifying Reasons for Leave



- FMLA red flags:
 - An employee calls in sick for more than 3 days
 - An employee is admitted for at least 24 hours to a hospital or other medical care facility
 - An employee repeatedly misses work for the same health condition
 - An employee misses work to care for 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; MS; ALS or Alzheimers
 - An employee requests leave to “take care of things” due to a parent, spouse or child being deployed



- **Critical sections on Medical Certification Form**

PART A: MEDICAL FACTS

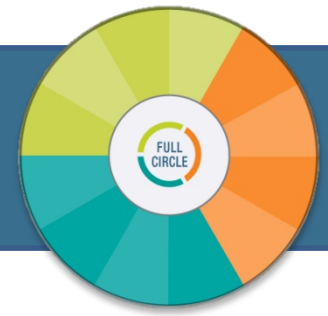
- What date condition commenced
- Probable duration of condition
- Whether employee was admitted for an overnight stay
- Date(s) employee was treated for the condition
- Whether employee will need to have treatment at least twice per year





- Critical sections on Medical Certification Form:
 - PART A: MEDICAL FACTS
 - Whether the employee is unable to perform any of his/her job functions
 - Identify those job functions

Medical Certification



- **Critical sections on Medical Certification Form:**
 - **PART B: AMOUNT OF LEAVE NEEDED**
 - Whether employee will be incapacitated for a single period of time
 - Whether employee will need to attend follow-up appointments
 - If there will be episodic flare-ups, estimate the frequency and duration

Medical Certifications



- Employee has 15 days from the date of receipt to return a fully completed medical certification form.
- If form returned, but either incomplete or insufficient, explain deficiencies and provide an additional 7 days to complete & return
- If form requires authentication or clarification, a HR professional, leave administer or management official can contact the health care provider. The employee's direct supervisor cannot contact the health care provider
- Second opinions are available if there is reason to doubt the validity of the medical certification (but not for injured service members)

Medical Certifications



- Medical Certifications for conditions with lengthy or indefinite durations:
 - Recertifications (limited value)
 - Every 6 months; or
 - Circumstances have changed significantly; or
 - The employer receives information that casts doubt on the stated reason for the absence or the validity of the certification
 - New certifications
 - With first absence for the condition in the new leave year

Medical Certification – Second and 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 a provider with whom the employer regularly contracts
 - There is nothing unlawful about asking those providers for referrals

Medical Certifications – Second and Third Opinions



- Communicate with the provider.
- Make sure the provider obtains the employee's medical records.
- 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.

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



- Restoration to position held when took leave
 - Same pay, benefits on return
 - Group health care coverage while on leave at the same cost to the employee.
- Options for payment:
- Deductions from paid time
 - Payment during leave
 - Recoupment upon return

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 / belief of FMLA fraud.
- On what evidence might an employer rely?
 - Rumor
 - Admission by employee
 - Documentation



- 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.



Questions



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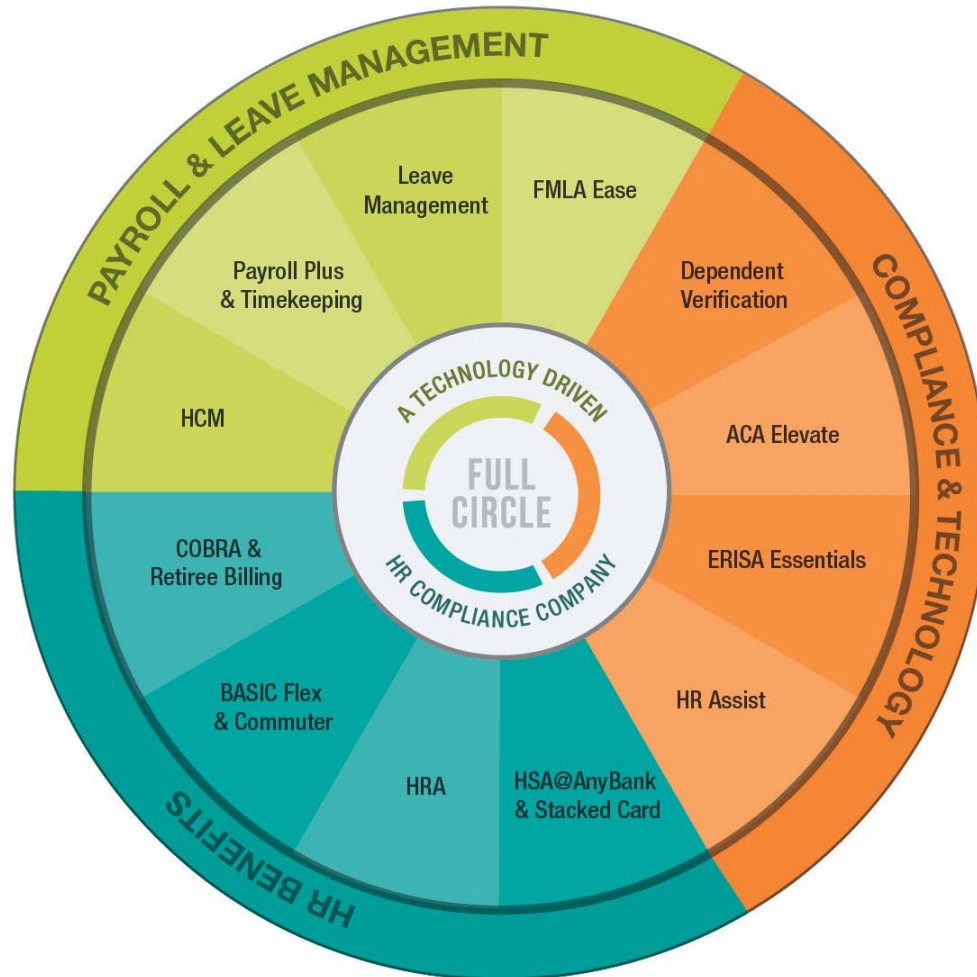
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