



Understanding the FMLA - Employer Requirements & FFCRA Updates



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➤ Presenter



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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
- FMLA Compliance
- FFCRA Updates *(Voluntary by Employers – January through March 2021)*
- Top Employer Issues & Mistakes
- Employer Best Practice Recommendations
- FMLA & COBRA
- The DOL
- Q & A

➤ 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
- Guarantees reinstatement to same or similar position



FFCRA – Emergency Paid Sick Leave Act (EPSLA)

Voluntary employer benefit: From January 1, 2021 – Ending: March 31, 2021

EPSLA is paid at 100% of wages up to cap (if the employee cannot telework) when:

1. There is a state or local COVID-19 quarantine or isolation order
2. The employee has been advised to self quarantine due to COVID-19 concerns
3. The employee is experiencing symptoms and is seeking medical diagnosis

2/3rds pay subject to caps (EPSL)

4. The employee is caring for an individual who:
 - Is under a quarantine or isolation order
 - Has been advised to self quarantine
 - Individual is a broader term than Family Member which is defined under the FMLA
5. Employee is unable to work in order to care for a son or daughter (as defined under the FMLA) due to school or place of care / childcare being closed or unavailable due to COVID-19 reasons (*Childcare is said to include relatives who are paid*)
6. Employee is not able to work because they are experiencing **substantially similar conditions** as specified by the Secretary of Health & Human Services, in consultation with the Secretaries of Labor and Treasury

Amount paid is “capped”

- Maximum Daily Rate \$511 per day capped at \$5,110
- 2/3 Pay Maximum Daily Rate \$200 per day capped at \$2,000

➤ FMLA – Employee Rights

FMLA Eligibility

1. (a) FMLA – EEs are eligible for up to **12 weeks of job protected leave** (26 weeks to care for injured service member) in a 12-month period
(b) EFMLA – 12 weeks of time for school / childcare closing – **Paid at 2/3 pay (excludes 1st 2 weeks (EPSL))**. Runs concurrent with regular FMLA “if available”

Eligibility Rights & Requirements

1. (a) FMLA – Employed for 12 months (within past 7 years with ER)
(b) EFMLA – Employed 30 days
2. (a) FMLA – Worked 1,250 hours in most recent previous 12 months
(b) EFMLA – Worked 30 days (includes full & part-time EEs)
3. (a) FMLA – Employer has 50 employees within 75 miles. Also, if the Employer controls or directs more the 50 EE even if outside the 75 mile radius
(b) EFMLA – Employers having **less than 500 Employees** / small employer & Emergency Responder exception
4. (a) FMLA – Employee must have a qualifying reason to take FMLA
(b) EFMLA – Allowed for school or childcare closings “only” – Under a mandated order for COVID-19 reasons
5. (a) FMLA – Leave can be taken in a block of time, intermittently, or on a reduced schedule. Leave can be taken in weeks, days, hours, or minutes.
(b) EFMLA – Continuous Leave (unless allowed intermittent by the employer)
6. Both – Right to reinstatement to the same or equivalent job
7. Both – Right to have health benefits continued during leave as if still working the same regular schedule

➤ COVID-19 Litigation

COVID-19 Employment Litigation Tracker And Alerts



OSHA COVID-19 Complaints

Federal: 12,642

State OSHA: 42,083

Employee Complaints filed related to COVID-19 as of January 14, 2021

Reference to cases is specific to employee / employer or employee class action case against employers. Excludes DOL/OSHA and State Agency complaints and findings related to COVID~19

COVID-19 Employer Litigation Cases

- Employers with 50 or fewer employees have been sued at a far greater rate than larger employers, facing a staggering 38% of COVID-19-related lawsuits
- Businesses with under 500 workers have been hit with more than 65% of all COVID-19 workplace litigation across the country
- Healthcare Industry remains the prime target for COVID-19 litigation, Manufacturing and Retail follow
- Just over 22% of all COVID-19 workplace claims filed in the US have been filed against healthcare entities

Reference: Fisher Phillips COVID~19 Tracker

➤ COVID-19 Litigation

Private Sector Industry Litigation:

- Healthcare – 22.3% (Highest)
- Manufacturing – 9.1% (2nd Highest)
- Manufacturing Lawsuit by type:
 - Remote Work / Leave Conflicts (41% of total)
 - Employment Discrimination (27% of total)
 - Retaliation / Whistleblower (20% of total)

Tips To Avoid A COVID-19 Lawsuit

1. Education & Understanding – HR Should make sure front-line managers understand COVID-19 employer protocols and, Federal & State Requirements & Leave laws (Employer provided training)
2. Assign an individual to regularly monitor and implement CDC, OSHA, and local guidance regarding appropriate COVID-19 workplace safety practices
3. Train employees on COVID-19 safety procedures
4. Put in place or update anti-retaliation policies making sure they cover workplace safety and health issues
5. If a layoff is inevitable make sure you follow required RIF / WARN requirements & your selection criteria is based on reasonable business criteria (last hired / first laid off) or objective based “objective” data that is measurable / quantifiable (productions rates/quality, other performance metric) and conduct an adverse impact analysis to determine whether the criteria disproportionately impacts any protected category of individuals

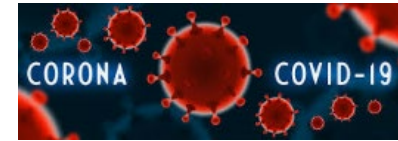
Reference: Fisher Phillips COVID~19 Tracker

➤ Some States Establish Limited Liability

Current federal law provides COVID-19 limited liability protection for healthcare and manufactures of PPE.

Private & Public Sector Employers should review State COVID-19 Limited Liability Laws and Executive Orders.

- Some States limit liability for employers and others from claims relating to COVID-19 exposure
- Provide immunity from liability for claims of exposure to, or infection from, COVID-19 **where an employer is acting in good faith in accordance with federal, state, or local guidance, and is not intentionally or recklessly negligent**
- More States are drafting similar Laws



COVID-19 Limited Liability Laws

- Alabama
- Arkansas
- California
- Iowa
- Kansas
- Louisiana
- Massachusetts
- Michigan
- Mississippi
- Nevada
- North Carolina
- Nevada
- Oklahoma
- Tennessee
- Utah
- Wyoming

➤ Limited Liability Risk Exposure

Employer Negligence not covered

- Failure to provide a safe work environment (OSHA)
 - Number of employees who contract COVID-19 “allegedly” at work
 - Does the employer have a “Pandemic Response Plan” in place? (DOL /ADA/OSHA)
 - Did the employer conduct “Contact Tracing”
- Did the employer interfere or retaliate against an employee requesting EFMLA / EPSL?
- Did the employer conduct Employee / Manager Pandemic Response Training?
- Did the employer interfere with the employee’s rights under the NLRA?
 - Concerted Activity Section 7 & 8

➤ Determining FMLA 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:**

1. The calendar year
2. Any fixed 12-month “leave year” such as a fiscal year, or a year starting on an employee’s “anniversary” date
3. The 12-month period measured forward from the date any employee’s first FMLA leave begins
4. A “rolling” 12-month “look back” period from the date an employee uses any FMLA leave

➤ FMLA Relationships

FMLA

- ✓ Self (Employee)
- ✓ Children
- ✓ Parents
- ✓ Spouses
- ✓ Next of Kin (Military Service Member)

EFMLA

- ✓ Child definition is the same as FMLA ... age 14 and under “special circumstances” requiring need to stay at home to provide care during daylight hours during school or care provider closure.

➤ Child FMLA Relationships

Children – Under 18

- ✓ Biological
- ✓ Adopted
- ✓ Step
- ✓ Foster
- ✓ Legal Ward/Custody
- ✓ In Loco Parentis
- ✓ Adult Children

➤ Child FMLA Relationships

Children – In Loco Parentis

A relationship situation in which a person has put himself or herself in the position of a parent by assuming and discharging the obligations of a parent to a child with whom her or she has no legal or biological connection. It exists when an individual intends to take on the role of a parent.

Presume parents must provide either:

- Day-to-day care for the child, or
- Financial support for the child

Minimum Required Documentation:

- A simple statement asserting the relationship (written?)

➤ Adult Child FMLA Relationships

Adult Children – Physical

“Incapable of self care in at least 3 ADLs or IADLs because of a mental or physical disability”

Instrumental activities of daily living (IADLs) are not necessary for fundamental functioning, but they let an individual live independently in a community, including:

- Housework
- Taking medications as prescribed
- Managing money
- Shopping for groceries or clothing
- Use of telephone or other forms of communication
- Using technology (as applicable)
- Transportation within the community

Activities of Daily Living (ADLs) refers to daily self care activities within an individual’s place of residence, outdoor environments or both. Basic ADLs consist of self-care tasks including:

- Bathing and showering
- Bowel and bladder management (recognizing the need to relieve oneself)
- Dressing
- Eating (including chewing and swallowing)
- Functional mobility
- Personal device care
- Personal hygiene and grooming
- Toilet hygiene

➤ Adult Child FMLA Relationships

Adult Children - Psychological

ADAAA Definition of Disability: An impairment that substantially limits a major life activity comparatively to most people

- Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, **emotional or mental illness** and specific learning disabilities

➤ Spouse Relationships

Spouse

- ✓ Traditional Marriage / Same Sex (Certificate of Marriage requirement)
- ✓ Common Law / Informal Marriage / Civil Union (according to state law)

➤ DOL: What You Need to Know

- Covered employers must post the revised [FMLA Poster](#) “Employee Rights and Responsibilities under the Medical Leave Act” **within 5 business days** after an employee has informed you of the need for leave, the employer must complete and provide the employee with the [Notice of Eligibility and Rights & Responsibilities](#)
- Attach to the notice one of the following appropriate certification forms:
 - [WH-380-E](#)
 - [WH-380-F](#)
 - Exigency for Military Family Leave: [DOL Form WH-384](#)
 - Serious Injury or Illness of Service member for Military Family Leave: [DOL Form WH-385](#)
- The employer must give the employee at **least 15 calendar days** to return the form; additional time may be allowed in some circumstances (**7 day cure rule**)
- Within **5 business days after** an employee has submitted the appropriate certification form, the employer must complete and provide the employee with the designation notice
 - [DOL Form WH-382 Employer Responsibility to Designate FMLA Leave and Notice to Employee](#)

➤ 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:*** RX regimen, PT/OT, chemical therapy, psych. therapy, manual manipulation of the spine, surgeries other than cosmetic, evaluation tests for the mere existence of a SHC

➤ Serious Health Conditions

A chronic health condition or incapacity requiring treatment

- **Lasting 3 consecutive full calendar days** (72 hours and 1 minute will suffice)
- **Requiring *2 HCP in person visits** for treatment within 30 days

- 1st in person office visit in 7 days
- 2nd within 30 Days

* What about Telemedicine (Diagnosis & Treatment)?

- If accepted by the employers Group Health Plan – most likely will be acceptable as a HCP visit

OR

- **One** occasion of treatment resulting in a regimen of treatment under the supervision of a health care provider (RX, therapy, etc.)

Note: The 3, 2, 1 Rule

➤ Serious Health Conditions

Types of SHCs

- In Patient – overnight hospital stay
- Continuing Care
 - Pregnancy or prenatal care
 - Incapacity and treatment
 - Chronic conditions
 - Multiple treatments
 - Long term / permanent
- Substance Abuse Treatment

➤ Serious Health Conditions

Pregnancy – Any period of incapacity for pregnancy or prenatal care

- Does not have to receive treatments to miss work
- Can be incapacitated for any period of time
- Morning sickness, ultrasound, blood work, etc.

Many states have PDL with very low or no threshold for eligibility and some pay partial wage replacement.

➤ Serious Health Conditions

Critical Definitions

- Unable to perform the functions of the position – Employee is unable to work at all, or is unable to perform any one of the essential functions of the employee’s position.
- An employee who must be absent from work to receive medical treatment for a serious health condition is considered unable to perform the essential functions of the position during the absence.

Outside work activities – *While on FMLA “or other leave.” Work at another employer or volunteer services allowed?*

Job descriptions – *Essential job functions*

➤ 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, the 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 Employer Mistakes

Employer Responsibility

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



➤ Employer Mistakes

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**

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

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

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

Disciplining Employee

- Taking disciplinary action because employee took FMLA
 - Adjust job performance goals
 - Retaliatory action?

Absentee Policy

- Counting FMLA against a company's absentee policy
 - Not designating FMLA when it should be
 - Employers responsibility to understand when FMLA applies

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

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 supposed to know?”*



➤ 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

➤ Notification Process cont.

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



➤ 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 an 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

➤ 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

➤ Employer Responsibilities

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 is 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

➤ Employer Responsibilities

COBRA & the FMLA

- Taking time off under FMLA **does not** constitute a qualifying event for continuation of Health Benefits under COBRA

COBRA qualifying events & the FMLA

- COBRA eligible when an **employee fails to return to work at the end of an FMLA leave**, and the employee's group coverage ends
- If the employee on FMLA leave notifies the employer prior to the expiration of the 12 week FMLA period that **the employee won't be returning to work**, group coverage ends and the COBRA qualifying event occurs on the date of that notification
- If the employer's health plan voluntarily extends coverage beyond those COBRA qualifying event dates, COBRA coverage does not begin until group health coverage is actually lost (employee must pay his/her share of the premium)

Note: If the employer eliminates group health coverage for all similarly situated active employees on or before the end of an employee's FMLA leave, no COBRA qualifying event can occur. **Example:** Business closes and discontinues offering company provided health benefits.

➤ 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 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

➤ Employer Awareness

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

➤ Employee Rights – File a Claim

Employees have a right to:

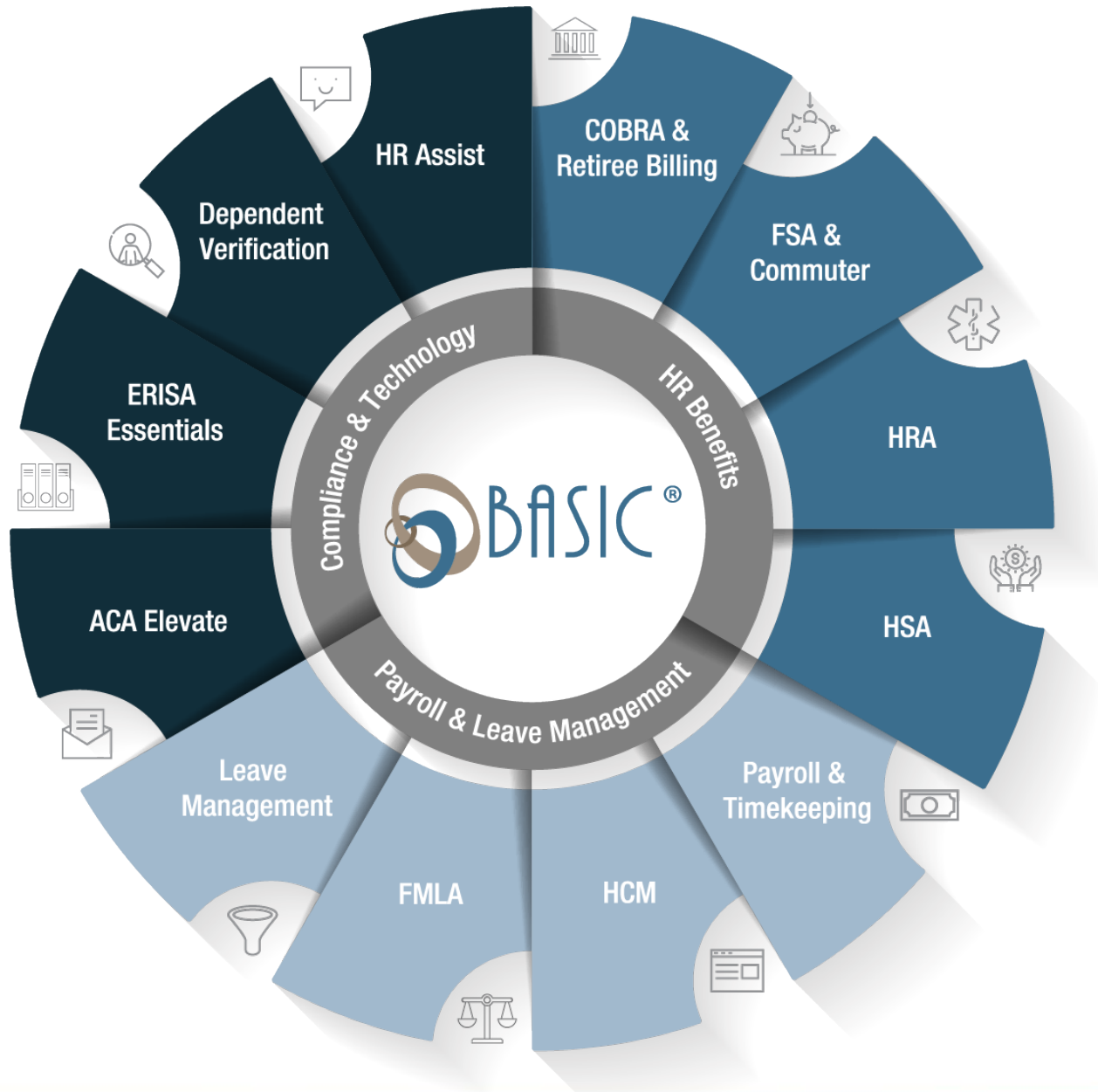
- File a complaint with Wage and Hour Division
- File a private lawsuit
- Action must be taken within **two years** after the last action which the employee contends was in violation of the Act, or **three years if the violation was willful**

➤ 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, and attorney's fees

QUESTIONS





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