Case Study: Reining in FMLA Absences in Health Care

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- JD and MBA from The University of Iowa
- Works with companies of all sizes to address FMLA issues
- Helps employers process, manage, track and reduce employee absences
- ComPsych is the largest EAP and provides work-life, behavioral health and absence management services
Tony Grycewicz, SPHR
Director of Organizational Development and HR Business Partner Services
Reading Health System
• Master’s in organizational psychology and MBA
• At RHS, helps improve physician engagement, reporting / support structures, onboarding, leadership development and succession planning
• Held several leadership positions in HR prior to RHS, including Sodexo and Marriott International
• Awarded Sodexo’s Spirit of Progress Award for North America
• Overview – the Employer’s Challenge
  • Compliance Landscape
  • Challenges Specific to Health Care
• Reading Health System Case Study
• ADA: Employer Concerns and Challenges
• FMLA/ADA Integration
• Checklist
The Employer’s Challenge

Over the last year, the four biggest challenges for our clients have been:

1. Compliance – understanding compliance obligations across several sites with ever changing federal and state obligations.

2. Oversight – decentralization - lack of consistency, control and expertise from decision-makers.

3. Intermittent Misuse – especially from particular groups of employees

4. ADA Concerns and Leave – lack of inclusion of ADA within the leave process.

About 40% of employers expect the importance of outsourcing FMLA and ADA services to increase.

The Employer’s Challenge

Regulatory expertise is a requirement for administering FMLA leaves in today’s complex and dynamic environment.

1993-2005: The quiet years

- FMLA passed in 1993
- The DOL regulations became effective in 1995
- The first Supreme Court case was in 2002

2006 – 2012: Increasing regulatory activity

- Qualifying Exigencies and Caregiver leaves (1/2008)
- DOL publishes survey results (5/28)
- DOL new FMLA regulations become effective (1/2009) (782 pages)
- Airline Flight Crew Act passes (12/2009)
- ADAAA passed (1/2009)
- DOL issues a study on the FMLA

2013 - 2015: The most active regulatory years to date

- DOL issues guidance on definition of in loco parentis to a child (6/2010)
- Courts actively shaping FMLA interpretation (e.g. honest belief)
- Supreme Court DOMA ruling creates 52 different state definitions of marriage (6/26/2013)
- Colorado Family Care Act goes into effect (8/7/2013)
- DOL issues new regulations on definition of “spouse”
- Federal court (Texas) blocks new regulations for at least four states
- Significant state leave changes in CALIF, ILL and MASS
- SCOTUS case on pregnancy accommodations decided
- More ADA “inflexible leave” enforcement

Dozens of bills related to leave are in various stages of state legislatures.
Compliance Landscape

Compliance Complexity

- FMLA – determining eligibility; reviewing medical certification, etc.
- ADA – determining “reasonableness”

Compliance Changes

Federal level

- Transformational case law – 2 cases per week on average

State Level

- Example: Over 10 different state leaves in last 2 years on pregnancy disability accommodations
  - Active bills in Connecticut, District of Columbia and now Massachusetts
Compliance Landscape

Case Law Challenges

In the last year, significant rise in cases where issues are caused by overreliance on or interference by managers or HR

Situations where managers/HR . ..

Involvement tainted termination decision

- Manager knew about employee’s back/neck injury and had not fired employees who made similar safety violation. *Smothers v. Solvay Chemicals, Inc.* (10th Cir. 2014)

- Manager became irate; told the employee she couldn’t take leave and needed a doctor’s note. Employer liable even when the manager immediately retracted demand and apologized. *Gordon v. U.S. Capitol Police*, (D.C. Cir. 2015)

Knew, but didn’t report to proper channels

- Manager got texts but didn’t report up. *Hudson v. Tyson Fresh Meats, Inc.*, (8th Cir. 2015)

- Manager knew and directed the employee to proper FMLA channels but didn’t follow up and fired the employee. *Preddie v. Bartholomew Consol. Sch. Corp.* (7th Cir. 2015)
STOP THE PRESSES! HR Professionals Individually Liable

• Recent court allowed FMLA claims against an HR Director herself, as an individual, to proceed to trial!

• Court: because she “played an important role” in and had “sufficient control” over the termination decision, she may be individually liable
  › Graziadio v. Culinary Institute of America (2d Cir., March 15, 2016)

• Here’s the thing. This is nothing new!! Many courts have held individuals liable under the FMLA.
  › Saavedra v. Lowe’s Home Centers, Inc. (D. NM 2010)
  › Haybarger v Lawrence County Adult Prob. & Parole (3d Cir. 2012)
Unplanned intermittent leave is always the biggest issue for employers (of course it is)

Often

- Particular challenge in one location
- Typical causes: highly-scheduled workforce; “viral” intermittent use (common among one location)

Unplanned absences . . . add to workload (69%), increase stress (61%), disrupt work of others (59%), and hurt employee morale (48%).

The Total Financial Impact of Employee Absences, SHRM/Kronos (2014)
Challenges Specific to Health Care

Health care has largest percentage of employees on FMLA – 39%

- Percentage of approved cases – 64%
- Average duration of continuous leave – 233.2 hours (29.2 days)
- Average duration of intermittent leave – 114 hours (14.3 days)
Challenges Specific to Health Care

- Intermittent leaves
- Hourly employees
- Held accountable for time
- High female populations
- Employee physicians
- Clinical managers
- Moonlighting
- Holiday leave requests
Challenges Specific to Health Care

Impact

- Overtime costs
- Temporary employee costs
- Reduced revenues / unfilled beds
- Administrative costs
- Legal costs
- Negative perception of FMLA resulting in inappropriate actions
- Morale
Reading Health System Case Study

• Previously “loose” culture – employees came and went as pleased
• Changed policy and started to manage time and staff more closely
• Uptick in intermittent leave
• Employees sought FMLA protection
Reading Health System Case Study

• Was approving high proportion of leaves (95%+)
• Backlog in leave administration
• Difficult for operations and HR; managing labor – 2/3 of budget
• Suspected abuse; unclear plan to manage
• Potential compliance issues – case driven and hard to keep up with
Reading Health System Case Study

In partnership with FMLASource:
• Processed historical leaves
• Reviewed policy
• Trained managers
• Customized communications
• Tracked med certs and return dates
• Applied FMLA tools for employer
• Identified trends, patterns
• Challenged questionable leaves
Reading Health System Case Study

<table>
<thead>
<tr>
<th></th>
<th>Before</th>
<th>After</th>
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<tbody>
<tr>
<td>Percentage of approved leaves</td>
<td>99%</td>
<td>68.4%</td>
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<tr>
<td>Total unprotected hours</td>
<td>??</td>
<td>76,000</td>
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<td>Intermittent denial rates</td>
<td>&lt;1%</td>
<td>32%</td>
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<tr>
<td>Successful re-certifications</td>
<td>0</td>
<td>66</td>
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**Impact**

- Consistency in administration
- Compliance confidence
- Better internal satisfaction
- Better data
- Better partnership with operations
- Reduction in absence abuse
## Reading Health System Case Study

### Results Comparison

<table>
<thead>
<tr>
<th>Average FMLA usage – health services industry benchmark*</th>
<th>625.00 lost workdays per 100 employees</th>
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<tbody>
<tr>
<td>Reading Health System results for 2015</td>
<td>400.48 lost workdays per 100 employees</td>
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<tr>
<td>Book of Business results for 2015</td>
<td>338.52 lost workdays per 100 employees</td>
</tr>
<tr>
<td>Total lost workdays saved translated to 7,800 employees (over average health services organization)</td>
<td>17,511 workdays</td>
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### Highlights

Compared to the average employer in health services, Reading Health System saw

- 17,700 fewer work days taken
- 67 more FTE working for Reading Health System than the average employer

*Integrated Benefits Institute data for 2014
Results achieved through

- Policy changes (backdating)
- Complete medical certification
- Pattern and excess leave tracking
- Authentication / verification of leaves
- Recertification
- Medical certification directly to the provider
- Second opinions
- Training and manager orientations
ADA: Employer Concerns

- 55% of employers said interacting with ADA when administering FMLA is “extremely difficult.” (2014 DMEC Study)

- 69% of employers say ADA leave are “challenging.” (Spring Consulting/Guardian 2015)

- 38% of employers do not have legally correct language in their policies. (ComPsych Study 2014)

EEOC issued guidance on May 9, 2016 providing direction on ADA Leaves

Introduction
The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act (ADA). The ADA prohibits discrimination on the basis of disability in employment and requires that employers provide reasonable accommodations to applicants and employees with disabilities that require such accommodations due to their disabilities.

A reasonable accommodation in general, “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.” This includes making modifications to existing leave policies and providing leave when needed for a disability, even when an employee does not take leave. Accommodations include reassignment to a different position where the employee is still performing the same function, providing a modified work schedule, providing an auxiliary aid, such as a reader, sign language interpreter, or the frequent use of an employee’s personal car.

EEOC guidance provides direction on reasonable accommodations. This document provides information and examples of reasonable accommodations that can be made for employees with disabilities.

Equal Access to Leave Under an Employer’s Leave Policy

Employees with disabilities must be provided with equal access to the same benefits as all other similarly situated employees. Many employees claim leave — paid and unpaid — as an employee benefit. Some employees provide a certain number of paid leave days for employees to use as they wish. Others provide a certain number of paid leave days designated as annual leave, sick leave, or “personal days.”

An employer may require an employee to use a reasonable amount of leave to accommodate the employee’s disability. If an employer requires an employee to use leave for a disability-related reason, the employer must treat the employee requesting leave the same as an employee who requests leave for a reason unrelated to a disability.

Example 1: An employee provides four days of paid sick leave each year to all employees and does not use any conditions for its use. An employee who has not used any sick leave this year requests to use three days of paid sick leave, which is used to accommodate an employee’s disability. The employer is responsible for providing leave to the employee for a disability-related reason.

Example 2: An employer provides a sick leave or vacation policy for all employees. The policy states that employees are eligible to use sick leave for any reason, including a disability. An employee requests to use five days of annual leave to accommodate a disability, and the employer denies the request because the employee is not eligible to use sick leave for a disability-related reason. The employer must provide the employee with the same leave that is provided to other employees for any reason.

Example 3: An employer’s policy requires that employees provide a doctor’s note or other documentation to substantiate the need for leave. An employee with a disability requests to use three days of annual leave to accommodate a disability-related reason. The employer’s policy does not require any documentation, and the employee provides a doctor’s note to substantiate the need for leave. The employer must provide the same leave that is provided to other employees for any reason.

Example 4: An employer’s policy requires that employees provide a doctor’s note or other documentation to substantiate the need for leave. An employee with a disability requests to use three days of annual leave to accommodate a disability-related reason. The employer’s policy does not require any documentation, and the employee does not provide a doctor’s note. The employer must provide the same leave that is provided to other employees for any reason.

Example 5: An employer permits employees to use paid annual leave for any purpose and does not require that they explain how they intend to use it. An employee with a disability requests to use one day of annual leave to accommodate a disability-related reason. Even though the employee has not used other employees annual leave, the employer must provide the employee with the same leave that is provided to other employees for any reason.

Example 6: An employer’s policy requires that employees provide a doctor’s note or other documentation to substantiate the need for leave. An employee with a disability requests to use three days of annual leave to accommodate a disability-related reason. The employer’s policy requires that employees provide a doctor’s note or other documentation to substantiate the need for leave. The employer must provide the same leave that is provided to other employees for any reason.
ADA: What are Employers’ Obligations?

• To engage in a “good faith interactive” dialogue or process with the disabled employee

• To evaluate whether or not a reasonable accommodation can help the employee perform the essential function of the job

• Employers must be proactive — engage in the good faith interactive process when the employer has reason to know that an accommodation may be appropriate
Many employers still do not have an ADA leave program.

For those that do, two big issues:

**FMLA/ADA Integration.** Two separate programs. ADA requests were appropriately directed to HR . . . but only when affirmatively requested (“I need an ADA accommodation.”)

- Courts are consistent: an FMLA request is also a request for accommodation under the ADA.

**Expertise.** Not a matter of having HR experts but a challenge keeping up with guidance on ADA.

Even when HR departments understand the ADA (ADAAAA) so much of the guidance flows from court cases.

**Recent decisions provide guidance on these questions:**

Do reasonable accommodations include . . .

- Telecommuting?
- “Open-ended” leaves?
- Flexible schedules?
- Changing managers?
- Occasional absences for employees who cannot demonstrate regular attendance?
FMLA/ADA Integration

Employers have run afoul of the law when they do not:

Recognize when an FMLA leave could also be ADA

• All the “inflexible” leave cases! Example: Employer denied leave—and did not consider the ADA—to employee because he was “probationary” and didn’t qualify for FMLA or their company leave. EEOC v. EZFLOW USA (2015)

Recognize the opposite – when an ADA leave could also be FMLA

• Employee’s ADA accommodation request for relief from mandatory overtime irrelevant because FMLA would cover the time requested. Santiago v. Conn. Dept. of Transportation (D.Conn. 2014)
So what can an employer do?

**FMLA**
- Use the mechanisms provided
  - Recertifications (no doctors’ notes for each absence!)
  - Clarification and authentication
  - Second opinion? Yes, but this targets the condition itself more so than the usage.
- Use the data
  - Let your managers report on what they see
    - Look for patterns, overuse, suspicious?
    - Benchmark
- Use your benefits
  - Help employees manage - EAP, disease management, work-life etc.

**ADA**
- Have flexible policy
- Unlike FMLA, look at each situation individually
- Engage in interactive process
- Identify ADA “triggers”
- Think hard about reasonable accommodation
- Document decisions
Q&A

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