

Case Study: Reining in FMLA Absences in Health Care

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About the Speakers

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Senior Vice President, Operations and FMLASource
at ComPsych

- 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



About the Speakers

Tony Grycewicz, SPHR

Director of Organizational Development and
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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



Agenda

- 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.

IS ADA THE NEW FMLA? Insights on Outsourcing Employer Compliance Support Services
(Prudential, 2015)



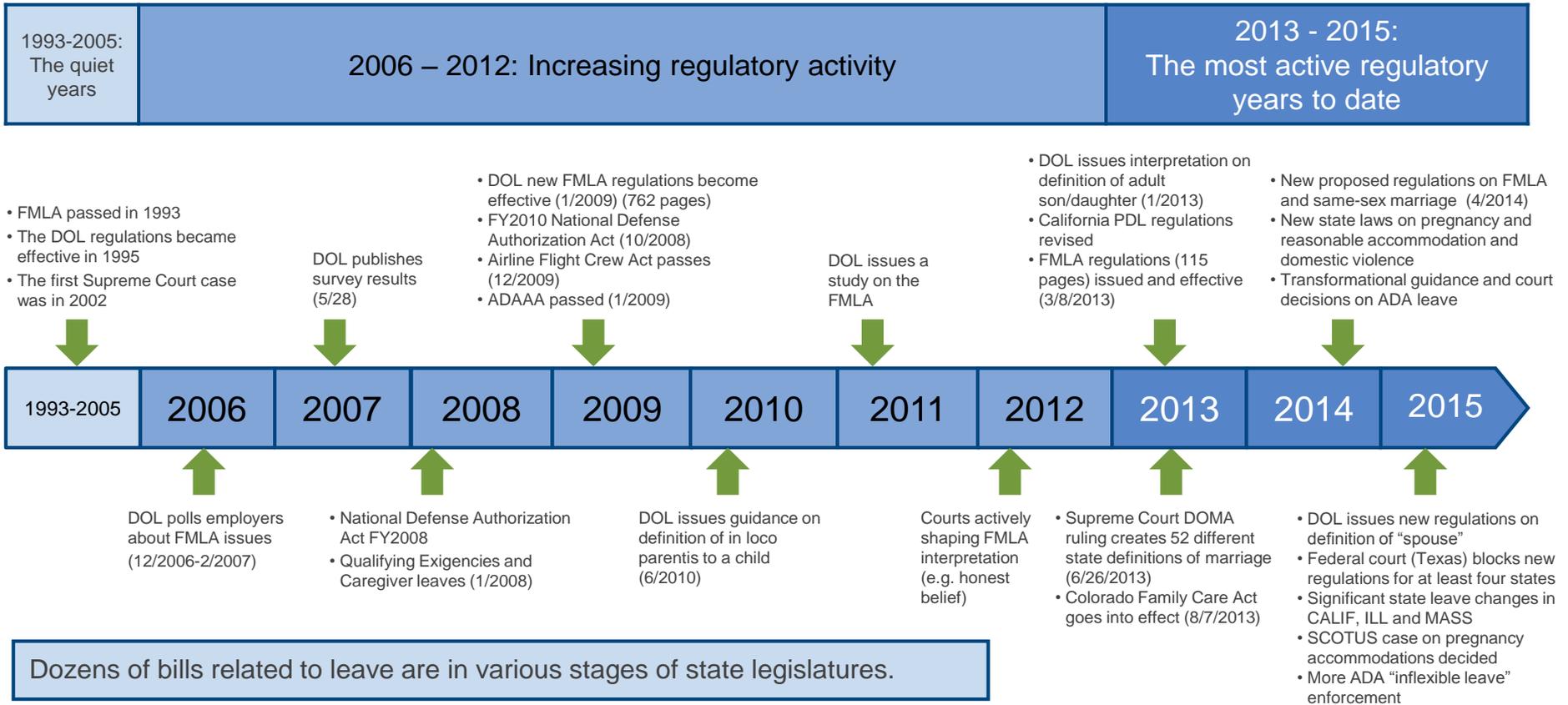
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The Employer's Challenge

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



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



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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)



Compliance Landscape

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.
 - › *Narodetsky v. Cardone Industries, Inc.* (E.D. Pa. 2009)
 - › *Saavedra v. Lowe’s Home Centers, Inc.* (D. NM 2010)
 - › *Haybarger v Lawrence County Adult Prob. & Parole* (3d Cir. 2012)

Compliance Landscape

Unplanned intermittent leave is always the biggest issue for employers (of course it is)

2015 DMEC Survey Results
(3/7/2016)
Top challenge (17%) “extremely
challenging” – intermittent leave

**Exhibit 17: Ranking of Challenges to Organizations
Rated as Extremely Challenging**



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)



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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

	Before	After
Percentage of approved leaves	99%	68.4%
Total unprotected hours	??	76,000
Intermittent denial rates	<1%	32%
Successful re-certifications	0	66

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

Average FMLA usage – health services industry benchmark*	625.00 lost workdays per 100 employees
Reading Health System results for 2015	400.48 lost workdays per 100 employees
Book of Business results for 2015	338.52 lost workdays per 100 employees
Total lost workdays saved translated to 7,800 employees (over average health services organization)	17,511 workdays

* Integrated Benefits Institute data for 2014

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



Reading Health System Case Study

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



U.S. Equal Employment Opportunity Commission

Employer-Provided Leave and the Americans with Disabilities Act¹¹

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 covered employers (employers with 15 or more employees) provide reasonable accommodations to applicants and employees with disabilities that require such accommodations due to their disabilities.

A reasonable accommodation is, generally, "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."¹² That can include making modifications to existing leave policies and providing leave when needed for a disability, even where an employer does not offer leave to other employees.¹³ As with any other accommodation, the goal of providing leave as an accommodation is to afford employees with disabilities equal employment opportunities.

The EEOC continues to receive charges indicating that some employers may be unaware of Commission positions about leave and the ADA. For example, some employers may not know that they may have to modify policies that limit the amount of leave employees can take when an employee needs additional leave as a reasonable accommodation. Employer policies that require employees on extended leave to be 100 percent healed or able to work without restrictions may deny some employees reasonable accommodations that would enable them to return to work. Employers also sometimes fail to consider reassignment as an option for employees with disabilities who cannot return to their jobs following leave.

This document seeks to provide general information to employers and employees regarding when and how leave must be granted for reasons related to an employee's disability in order to promote voluntary compliance with the ADA. It is consistent with the EEOC's regulations enforcing Title I of the ADA, as well as the EEOC's 2002 Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (a link to the Guidance appears at the end of this document).

Equal Access to Leave Under an Employer's Leave Policy

Employees with disabilities must be provided with access to leave on the same basis as all other similarly-situated employees. Many employers offer leave -- paid and unpaid -- as an employee benefit. Some employers 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."

If an employer receives a request for leave for reasons related to a disability and the leave falls within the employer's existing leave policy, it should treat the employee requesting the leave the same as an employee who requests leave for reasons unrelated to a disability.

Example 1: An employer provides four days of paid sick leave each year to all employees and does not set 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 because of symptoms she is experiencing due to major depression¹⁴ which, she says, has flared up due to several particularly stressful months at work. The employee's supervisor says that she must provide a note from a psychiatrist if she wants the leave because "otherwise everybody who's having a little stress at work is going to tell me they are depressed and want time off." The employer's sick leave policy does not require any documentation, and requests for sick leave are routinely granted based on an employee's statement that he or she needs leave. The supervisor's action violates the ADA because the employee is being subjected to different conditions for use of sick leave than employees without her disability.

Example 2: 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 one day of annual leave and mentions to her supervisor that she is using it to have repairs made to her wheelchair. Even though he has never denied other employees annual leave based on their reason for using it, the supervisor responds, "That's what sick leave is for," and requires her to designate the time off as sick leave. This violates the ADA, since the employer has denied the employee's use of annual leave due to her disability.

Employers are entitled to have policies that require all employees to provide a doctor's note or other documentation to substantiate the need for leave.

Example 3: An employee with a disability asks to take six days of paid sick leave. The employer has a policy requiring a doctor's note for any sick leave over three days that explains why leave is needed. The employee must provide the requested documentation.

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



ADA Challenges

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 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?



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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)



Checklist

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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