



Understanding the FMLA: Employer Requirements

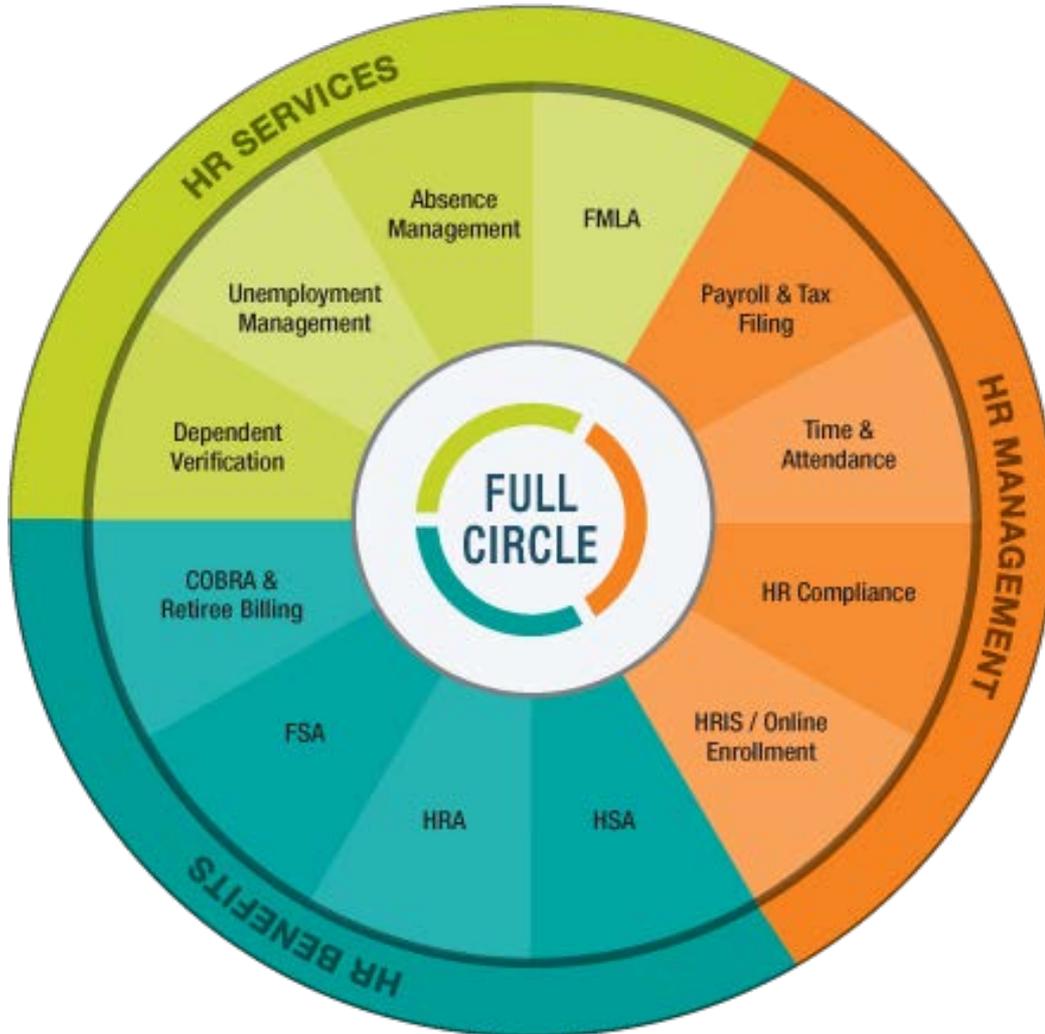
Presented by: Joe Aitchison



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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.



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Agenda



- FMLA – From the DOL's Perspective
- FMLA Compliance
- Top Employer 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
- Guarantee reinstatement to same or similar position

FMLA – Employee Rights



- **FMLA Eligibility**
 - Employees are eligible for up to 12 weeks of job protected leave (26 weeks to care for injured service member) in a 12-month period

- **Eligibility Rights & Requirements:**
 1. Employed for 12 months (within past 7 years with ER)
 2. Worked 1,250 hours in most recent previous 12 months
 3. Employer has 50 employees within 75 miles
 - Employer controls or directs more the 50 EE even if outside the 75 mile radius
 4. EE must have a qualifying reason to take FMLA
 5. 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
 6. Right to reinstatement to the same or equivalent job
 7. Right to have health benefits continued during leave as if still working the same regular schedule

Determining 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:

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

FMLA Relationships



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

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

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?)

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.

Adult Child FMLA Relationships - Physical



Children – Adult Children

“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)
- ✓ Missouri does not recognize common law marriage (since 1921) and follows the Fed FMLA.

DOL: What You Need to Know



- Covered employers must post the revised [FMLA Poster](#) “Employee Rights and Responsibilities under the Medical Leave Act (as revised 04/16).
- **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

- **1** 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.

- Missouri has the State Human Right Act covers employers with 6 or more employees.
- Missouri follows the Fed Pregnancy Discrimination Act which prohibit sex discrimination on the basis of pregnancy. The Act covers discrimination "on the basis of pregnancy, childbirth, or related medical conditions."

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 to be 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, 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



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?”*



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



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

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 a 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



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 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 12week 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.



• 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, attorney's fees



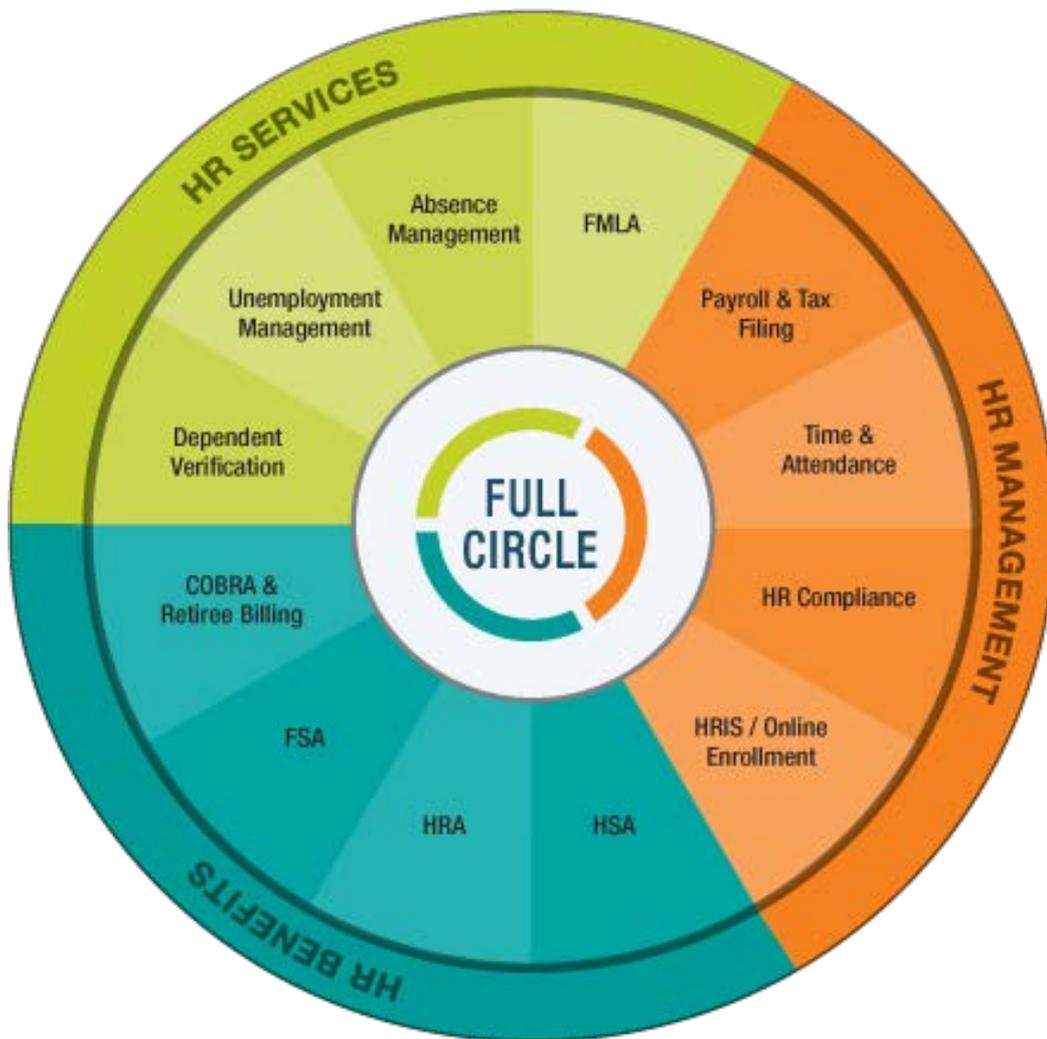
Questions



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