

FMLA & ADA: Avoiding Pitfalls and Reducing Absences

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STAY AHEAD of Absenteeism



About the Speakers

Matt Morris

Is responsible for compliance as VP of FMLASource®, a ComPsych® program

Employment attorney by background

13 years of experience in FMLA administration. Frequent speaker on FMLA, state leaves, ADA

Invited by DOL for FMLA roundtable; authored response to proposed FMLA changes—cited many times by the DOL in final rule

Bert Cleary

Senior Human Resources Manager, Compensation and Benefits, Welch Foods, Inc.

Manages relationships and oversees disability and leave

14 years experience in HR

BS. University of Massachusetts Amherst; MBA and MHA the Warrington College of Business Administration at the University of Florida

Agenda

Thoughts on the issue – FMLA and ADA

Welch's Story

Combating Overuse

Complying With the ADA

Recap and Takeaways



Initial Thoughts

2011 Study of HR Professionals (Employers Resource Association)

- Biggest headache is the FMLA
- In particular, biggest issue was controlling leave, particularly intermittent leave

Since then – more state leaves, growing ADA issues, more FMLA leaves taken.

- Our study: FMLA leaves continue to grow by 10% year over year

So, now what?

Employer quotes to Department of Labor:

“This is the single most serious area of friction between employers and employees seeking to use FMLA leave.”

“The use of unscheduled, intermittent FMLA leave has a drastic negative impact on productivity and profits for employers.”

Challenges of FMLA – Intermittent Leave

Self-reported absences

- How do you know if the employee really did have a migraine?
- Can breed abuse by employees

Hard to track small increments

Time-consuming documentation

Decrease in morale for staff who has to cover for absent employees

Additional staffing costs—overtime, 2nd shifts, temporary workers

Intermittent Leave for Specific Industries

Industry	Percentage of leave that is intermittent	Average time off per employee per year on intermittent leave
Call Centers	51%	123 hrs (15.4 days)
Casinos	58%	136 hrs (17 days)
Government	41%	89 hrs (11.1 days)
Health Care	49%	104.2 hrs (13 days)
Manufacturing	21%	99 hrs (12.4 days)
Professional Services	12%	62 hrs (7.8 days)

In 2014, **35%** of our clients' leave usage was intermittent

And Now the ADA

Huge ADA Leave Settlements

- Employers did not engage in interactive process (kept bright-line rules – EEOC “inflexible rules”)
- Example: 2014 settlement hospital group = \$1.35M

Any Help?

EEOC Guidance on ADA leaves expected shortly after pigs fly

Overlap issues

- How to integrate FMLA and ADA
- Should you give leave? If so, how much
- How can you do this case-by-case? No rules

2014 EEOC settlement – \$145,000 single-employee for providing FMLA but not considering the ADA.

EEOC v. Paloma Blanca Health Care Associates, LLC

Welch's Story

Welch's challenges over the years include:

- Employees being out for prolonged periods of time
- Inability to follow up on particular absences with any regularity.
- Sophisticated FMLA intermittent users and abusers
- Leaves that exhaust FMLA entitlements (reasonable accommodations?)
- Decoupled FMLA and ADA processes

Our collective work

Combating overuse

- Identifying and challenging suspect intermittent use

Complying with the ADA

- Integrating and analyzing potential ADA situations

What's an Employer to Do?

Two main goals for employers:

- Combating overuse
- Comply with the law(s)

What's the trick?

- How do you do both at the same time?

Our presentation:

- Discuss what it means to do both—how has Welch's confronted its obligations
- How do you make this (burdensome) overlap of FMLA and ADA obligations work

Part I:

Combating Overuse

Tools to Manage Absences

Apply the rules

- Determine eligibility
- Require medical certification
- Require timely FMLA usage reporting

Look for Overuse

- Recertify “significant” overuse

Tools to Manage Absences

Look for Patterns

- Fridays/Mondays? Holidays?

Look for Abusers

- Recertify if the leave is in doubt

Use the “Honest Belief” Rule

Some courts: job protection can be denied based on an honest suspicion that the employee was abusing her leave

In particular, Sixth and Seventh Circuits have adopted this standard

Analysis is largely fact-intensive

“Honest belief/suspicion” standard:

An employer “need not conclusively prove that (the plaintiff) has misused her leave; an honest suspicion will do.”

Recent “Honest Belief” Cases

Employee took FMLA . . .	Employer thought he/she was cheating because . . .	Case
For a spine injury after a car accident	She was seen by coworkers (eight written statements) “playing football with her children, working in her yard, and assisting her children with costume changes and other tasks at lengthy dance rehearsals and recitals”	<i>Dalpiaz v. Carbon County, Utah, (10th Circuit 2014)</i>
To care for his daughter who was sick	<p>He had past issues with unexcused absences to take an annual May vacation. They did not believe he was using the FMLA he was approved for and asked him for doctor’s notes.</p> <p style="text-align: center;">Court said there was “no honest belief!”</p>	<i>Yontz v. Dole Fresh Vegetables (S.D. Ohio 2014)</i>

That Was Awfully Cynical. What Else Can We Try?

Health improvement strategies!

- EAP, Work/Life, Wellness, etc.
- Large numbers of chronic intermittent conditions are for stress
- 75% of all EAP users report, post-treatment, that their issues are “resolved.” (ComPsych data, 2014)

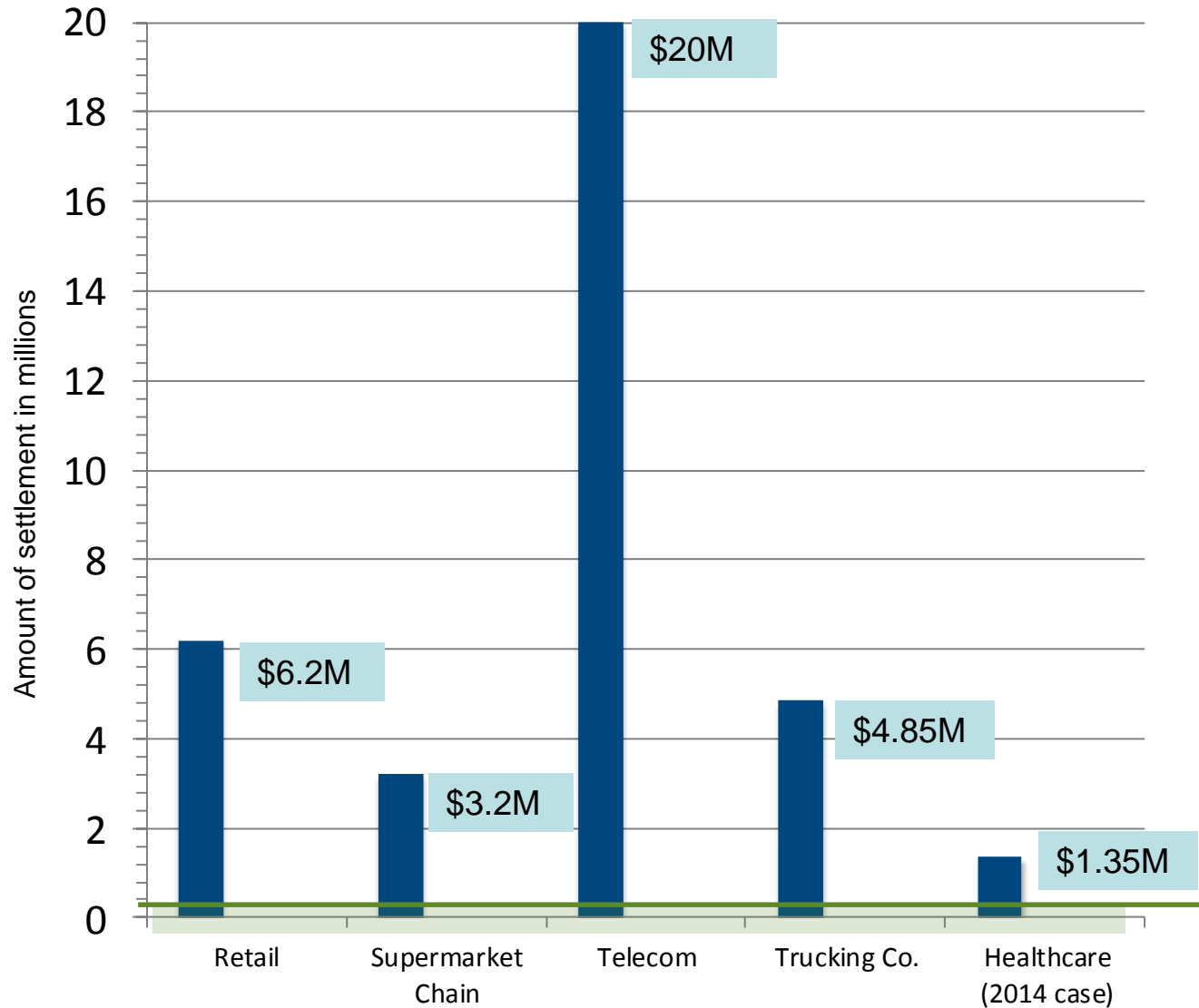
“[E]mployees who are guided toward effective health promotion, disease management or EAP programs as part of an FMLA management strategy may have less severe (or fewer) aggravating conditions at the time of their disability absence.”

*“Early Warnings: Using FMLA to Understand and Manage Disability Absence”
(IBI 2013)*

Part II:

Complying With the ADA

In Case You Were Wondering What the Big Deal Is? ADA vs. FMLA



\$92,500 –
Single employee
who was denied **one
day** of leave -
*University of
Maryland School of
Medicine*

■ ADA Settlements

Estimated
FMLA verdict:
\$335,000

ADA Leave – Recent Litigation and Settlements

The EEOC has kept its promise of “vigorous enforcement” on “inflexible leave” cases over the past 12 months

- Prevailed against motion to dismiss against UPS
 - Case is now more than 5 years old
- \$1.35M settlement – New Jersey health care group
- \$85K settlement (for 5 employees) – small Chicago marshmallow manufacturer (November 2014)
- \$65,000 settlement against single plaintiff – did not accommodate a “probationary employee” (January 2015)

But, in one case, the employer did not provide a “flexible leave” policy and **won**.

- Six-month leave is not reasonable. “[R]easonable accommodations...are all about enabling employees to work, not to not work.” *Hwang v. Kansas State University* (10th Cir. 2014)

ComPsych 2014 Survey on Employers' ADA Leave Policies

According to our July 2014 study, many employers have *not* learned their lessons

- Employers miss **8.4%** of FMLA cases that require an ADA review (approximately half of FMLA requests for a serious health condition)
- **38%** of employers still have “inflexible” language in their policies

Also, most employers don't

- Have comfort around the interactive process and their responsibility regarding leaves as accommodations
- Have processes to identify denied FMLA leaves as potential ADA accommodations

2014 case – EEOC filed suit against employer with four month “inflexible leave policy.” *EEOC v. Dialysis Clinic, Inc. (E.D. CA)*

How Do We Integrate ADA Leaves?

What are we solving for?

- Identifying ADA requests
- Determining disability (ADA standard)
- Engaging in the “interactive process” properly
- Determining the right (reasonable) amount of time

Primary Focus:

Compliance with the law, creating a “flexible” process and integrating FMLA and ADA leave administration

Identifying ADA Requests

FMLA request also can be considered an ADA request

Welch's was concerned that they weren't catching all ADA requests for leave.

What's the big deal?

- No magic words are required.
- FMLA requests can also be ADA requests (according to dozens of court cases)

"The substance of the request is what matters, not whether the employee submits the request on any particular form."

- EEOC NY Dist. Dir. Kevin Berry (2014 settlement press release)

Determine Whether a Condition Is a Disability

Not all conditions qualify as a disability under the ADA.

Welch's needed help identifying what qualifies for ADA.

What's the big deal?

- Temporary conditions can trigger temporary accommodations
- Pregnancy disabilities are now ADA qualifying

Engaging in the Interactive Process

This is not just a simple conversation. It's a multi-factored negotiation rooted in legal standards

Welch's wanted help in considering how to engage in these discussions

What's the big deal?

- Discussions must be “meaningful”
- Employers often make knee-jerk, “fairness” decisions instead of following the legal standard. Such as:
 - Cases involve: responding fully, and considering all alternatives

Determining the Right (Reasonable) Amount of Time

In the end, it's about how much time to grant. Knowing when to "say when"

Welch's needed help making ADA decisions.

What's the big deal?

Test is multi-factorial. Same amount of leave could be reasonable sometimes and not in other cases

- **Same leave, different result**
- **Many factors to consider** They include: cost; effect on the facility; effect on the company as a whole'; the nature of the operations, including geography, type of work, etc.; and impact of leave on coworkers. 42 U.S.C. § 12111(10)(B).

Recap and Takeaways

Three Takeaways

1. Walking and chewing gum – effective absence management requires both
 - Complying with the law (FMLA and ADA, for starters; and
 - Reducing the cost and/or the impact of absences, especially intermittent
2. Address intermittent overuse with the tools we're given
3. True ADA strategy starts with compliance

According to a 2014 DMEC study, **38%** of employers said interacting with ADA when administering FMLA” was **“extremely difficult.”**

This had the **highest percentage** of “extremely difficult” votes of any “FMLA activity”

Q&A