



Forum Webinar

Overcoming FMLA and ADA Challenges:

A Case Study in Absenteeism Improvement

COMPSYCH[®]
GuidanceResources[®]Worldwide

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About the speakers

Matt Morris

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

Marjory D. Robertson

In-house U.S. employment counsel for Sun Life for 16 years

Advises managers and HR on employment law issues, including FMLA, ADA and other leave laws

Prior to Sun Life, worked at national law firms advising employers on legal issues

Frequent speaker at employment law training sessions

Agenda

Background

FMLA & ADA: *What's All the Fuss About?*

How employers address FMLA/ADA issues

Current and Challenging Issues

1. Compliance across multiple states
2. Oversight by managers and HR
3. Intermittent misuse
4. ADA leaves

Wrap Up and Questions

What's all the fuss about?

FMLA and ADA have become increasingly more difficult over the past 10 years. Employer surveys uniformly cite leave management, FMLA, and ADA particularly as one of the most challenging areas of HR.

FMLA Challenges

- Calculating time taken
- Analyzing the reason for leave
- Unplanned intermittent leave

ADA Challenges

- No clear rules (e.g., *reasonable accommodation*)
- No standardized limits on time taken
- Enormous settlements

How have employers addressed this?

- **In house** – additional staffing, training, legal support
- **Co-sourced solution** – vendor provides software package and other administrative tools; employer does the administration
- **Fully outsourced solution**

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)

Challenge 1:

Compliance

Complexity and change

Complexity

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

Change: Federal level

- Transformational case law – two cases per week on average

Complexity and change

Change: State level

- **Pregnancy disability accommodations laws** – 10+ different states.
- **“Paid Family Leave”** – lots of state bills and momentum
 - Current laws: NY, NJ, RI, CA, WA (unfunded)
 - Active bills: CT, D.C., MA
 - Most pay 100% for 12 weeks up to \$1,000 (then the bills vary)
- **“Paid Sick Leave”** – 5 states (CA, MA, CT, OR, VT) and also cities, counties and D.C.

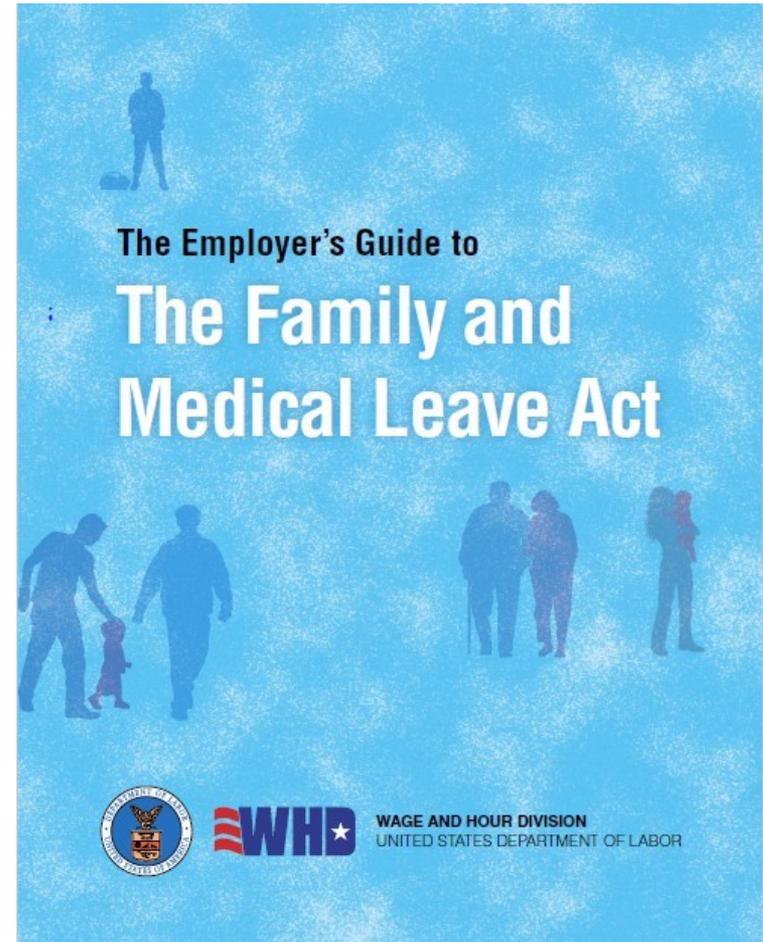
Challenge 2:

Oversight

DOL helps employers understand rights

In May 2016, the U.S. Department of Labor issued a 75-page guide for employers on FMLA.

I wonder why . . .



Oversight has become a bigger issue

- Organizations now expanding (acquisitive) often interstate
- Fewer HR resources
- Challenging to equip managers to address these core HR issues (e.g., intermittent leave and staffing challenges)

40% of employers have trouble making leave decisions. **47%** challenged with keeping accurate attendance.

Guardian Life Survey 2015

44% of employers said training supervisors on FMLA is “extremely difficult.”

DMEC Study, 2015

Challenges in law

A significant rise over the last 12 months in cases where issues are caused by overreliance on or interference by managers or HR

Situations where managers/HR . . .

- tainted termination decision
- knew of leave, but didn't report to proper channels
- made improper comments
- had enough information to know there was a medical condition, yet did nothing
- improperly contacted employees during the leave

Challenges in law – examples

Managers/HR tainted termination decision

- Manager knew about employee's back/neck injury and didn't fire employees who made similar safety violation.
Smothers v. Solvay Chemicals, Inc. (10th Cir. 2014)
- Recent court allowed FMLA claims against an HR Director, as an individual, to proceed to trial because she “played an important role” in and had “sufficient control” over the termination decision.
Graziadio v. Culinary Institute of America (2nd Cir., March 15, 2016)

Managers/HR knew of leave, 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)

Challenges in law – examples

Managers/HR made improper comments

- “Phas[ing] out” the employee.
Janczak v. Tulsa Winch (10th Cir. 2015)
- We paid for your insurance so we expect you to be at work – employer loses.
Hefti v. Brunk Industries, Inc. (E.D. Wis. 2015)
- “A dilemma . . . to discipline” employee for taking USERRA leave” and similar emails displayed an “anti-military animus”.
Arroyo v. Volvo Group N.A. LLC (7th Cir. 2015)

Managers/HR had enough information to know there was a medical condition, yet did nothing

- Providing doctor’s note to “superiors” plus a work-related incident = adequate notice.
Festerman v. County of Wayne (6th Cir. 2015)
- Providing doctor’s note with the condition (pregnancy) and restrictions (20 hours/wk max) one day after receiving it was “adequate notice”.
Wages v. Stuart Mgmt. Corp. (8th Cir. 2015)

Challenges in law – examples

Managers/HR improperly contacted employees during the leave

The court said that this one crossed the line and was unlawful.

- Employer requested employee update compliance files, review a safety project and drop off files at the office.
Smith-Schrenk v. Genon Energy Services, LLC (S.D. Tex. 2015)

In two other cases, the court said that the contact was okay.

- Calling employee a few times with questions.
Bryant v. Dept. of Aging and Disab. Svcs (5th Cir. 2015)
- Asking employee to help participate in an internal investigation regarding her accounting responsibilities.
Krause v. Eihab Human Services, Inc. (E.D.N.Y. 2015)

Challenge 3:

Intermittent Misuse

Unplanned intermittent leave

Employers repeatedly cite their number one issue as **unplanned intermittent leave**. (Of course it is).

What's not to like?

- Difficult to challenge usage
 - Self-reported. How do you know whether the employee is really sick?
 - Can breed abuse
- Hard to track small increments
- Time-consuming documentation
- Creates morale issues
- Additional staffing costs—overtime, 2nd shifts, temporary workers

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)

Legal developments

More focus on what an employer **can't** do versus what they can.

- Cannot require a doctor's note for each intermittent episode.
Oak Harbor Freight Lines, Inc. (D.Or. 2014)
- Cannot deny absences that go above the estimate by the doctor (it's an "estimate").
Hansen (7th Cir. 2014)

Legal developments

So what *can* an employer do?

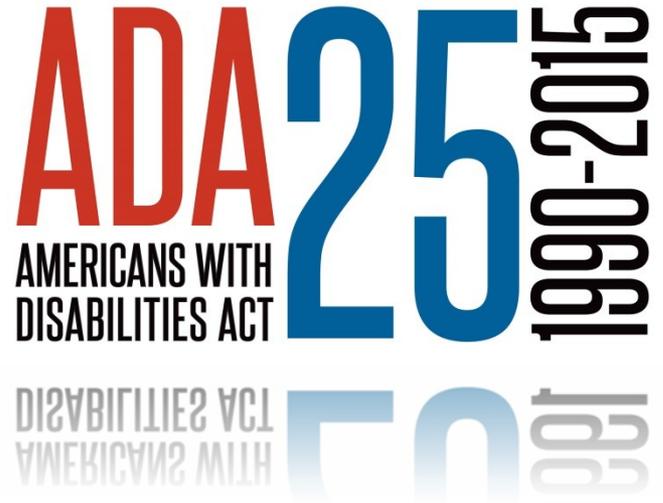
- Use the mechanisms provided
 - Re-certifications (no doctor's note for each absence)
 - Clarification and authentication
 - Second opinion? Yes, but this targets the condition itself more so than the usage.
- Use the data
 - Let your managers report on what they see
 - Look for patterns, overuse (suspicious?)
 - Benchmark
- Use your benefits
 - Help employees manage—Employee Assistance Programs (EAP), disease management, work/life, etc.

Challenge 4:

ADA Leaves

The Americans with Disabilities Act

- Applies to all employers with 15 or more employees
- Protects individuals with disabilities from discrimination
- Requires employers to offer “reasonable accommodation” if needed in order to perform essential functions of a job
 - Leaves of absence are reasonable accommodations



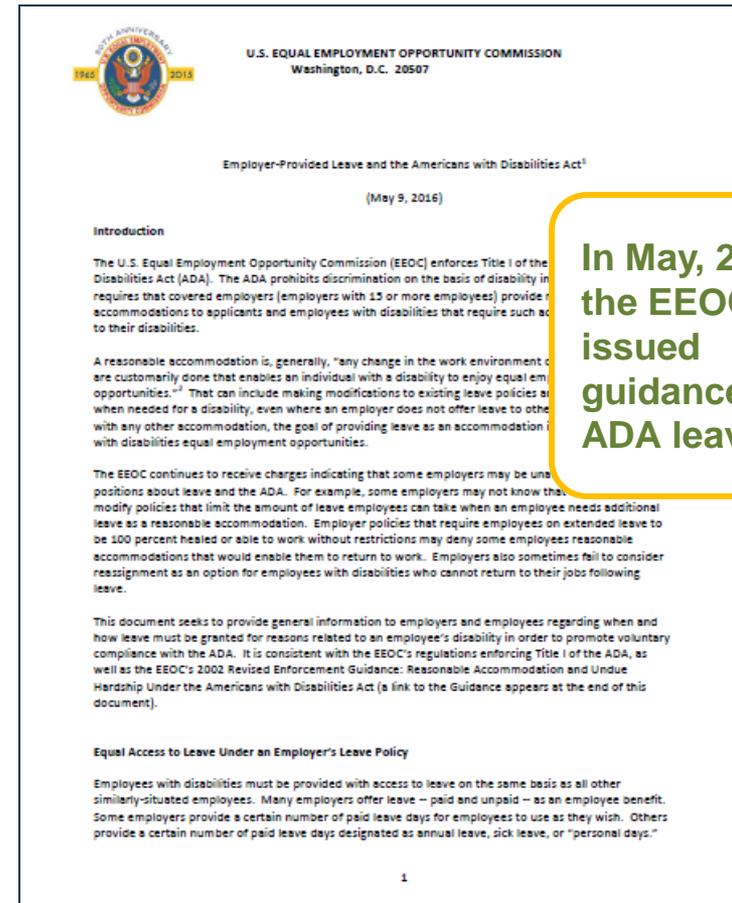
ADAAA

The Americans with Disabilities Acts Amendments

- The ADAAA of 2008 broadly expanded the definition of disability.
- Congress intended to make it clear that more individuals should be considered disabled and protected by the law.

Employer concerns

- **55%** of employers said interacting with ADA when administering FMLA is “extremely difficult.”
2014 DMEC Study
- **69%** of employers say ADA leaves are “challenging.”
Spring Consulting/Guardian 2015
- **38%** of employers do not have legally correct language in their policies.
ComPsych Study 2014



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



Key gaps for many employers

- Not having a process for evaluating leave requests under the ADA – they only consider the FMLA.
- Not understanding....
 - that they may have an obligation to start the interactive process even if an employee has not requested an ADA accommodation.
 - that courts may view the filing of a request for FMLA leave as a request for an accommodation under the ADA.
 - the “interactive dialogue” and “individualized inquiry” requirements of the interactive process.
 - that company policies are not enough to justify denying a request.
- Even when understanding the ADA (ADAAAA), so much of the guidance flows from court cases.

Understanding FMLA/ADA integration

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

recognize when FMLA leave could also trigger the ADA

- All the “inflexible” leave cases.
 - Employer denied leave—and did not consider the ADA—because employee was “probationary” and didn’t qualify for FMLA or their company leave.
EEOC v. EZFLOW USA (2015)
- All the 100% healed cases.
 - Under the FMLA an employer can require a fitness for duty certification. However, if an employee is not 100% ready, the employer may have an obligation to offer a reasonable accommodation.
- **New:** EEOC guidance on leaves under the ADA.

recognize when a request for an ADA leave could also be FMLA

- If an employee asks to be relieved of mandatory overtime, an employer may not have to accommodate under the ADA because mandatory overtime may be an essential job function. However, employees can use FMLA leave – “essential job duty” analysis is irrelevant under the FMLA.
Santiago v. Conn. Dept. of Transportation (D.Conn. 2014)

What's the big deal?

We've been talking about the *Sears* case for years, but the EEOC is still at it.

“Inflexible Leave” cases

- ***EEOC v. EZFLOW USA***
- ***EEOC v. ValleyLife***
- ***EEOC v. Pactiv*** (\$1.7M settlement)
- ***EEOC v. BMO Harris*** (\$400K settlement)
- ***EEOC v. Children's Hospital & Research Center*** (\$300K settlement)
- ***EEOC v. Denny's*** (\$1.3M settlement)
- **NEW: *EEOC v. Lowe's*** (\$8.5M settlement)

“100% healed” cases

- ***EEOC v. Chemical Transportation*** (\$300K settlement)
- ***EEOC v. Brookdale Senior Living*** (\$112.5K settlement)
- ***EEOC v. Neenah Paper***
- ***EEOC v. Interstate Distributor Co.*** (\$4.85M settlement)
- ***EEOC v. UPS & UPS v. Department of Fair Employment & Housing***

Need for expertise

Recent decisions provide guidance on these questions:

- Do **disabilities** include . . .
 - pregnancy-related conditions?
 - temporary conditions?
 - stress caused by a particular manager?

Need for expertise – examples

Do **disabilities** include . . .

Pregnancy-related conditions? Yes, maybe.

- Yes says the EEOC — Enforcement Guidance: Pregnancy Discrimination and Related Issues, 2014.
- Sort of says the Supreme Court — *Young v. UPS* said that it's not an ADA disability but should be treated like other like disabling conditions.
- Many state laws cover leave as a pregnancy accommodation.

Temporary conditions? Yes, maybe.

- *Summers v. Altarum Institute* (4th Cir. 2014)

Need for expertise – examples

Do **disabilities** include . . .

Stress caused by a particular manager or by a particular job? Probably not, but maybe. Cases are mixed.

- A disability does not include stress caused by a particular manager's manner of oversight.
Higgins-Williams v Sutter Medical Foundation (Cal. Ct. App. 2015)
- The major life activity of “working” is not impaired when one cannot perform one specific job because of stress but can perform others.
Adetimehin v. Healix Infusion Therapy, Inc. (S.D. Tex. 2015)
- But yes, in some cases, given the breadth of the law.
Palmerini v. Fidelity Brokerage Svcs. LLC, (D.N.H. 2014)

Need for expertise – examples

Recent decisions provide guidance on these questions:

- Do **reasonable accommodations** include . . .
 - telecommuting?
 - open-ended leaves?
 - Flexible schedules?
 - Changing managers?
 - Occasional absences for employees who can't demonstrate regular attendance?

Need for expertise – examples

Do reasonable accommodations include . . .

Telecommuting? That depends.

- An employer could prohibit working from home.
EEOC v. Ford Motor Company (6th Cir. 2015);
Doak v. Johnson, Dept. of Homeland Security (D.C. Cir. 2015)
- Telecommuting not per se unreasonable.
Vangas v. Montefiore Med. Ctr. (S.D. NY 2014)
- “The suggestion that working from home is not required except in extraordinary circumstances may lead an employer to violate the ADA.”
ADA: Reasonable Accommodation, EEOC Informal Discussion Letter (2014)

Need for expertise – examples

Do reasonable accommodations include . . .

Open-ended leaves? Generally not.

- “Open-ended” leave extensions do not constitute reasonable accommodations.”
Exchevarra v. AstraZeneca (D. Puerto Rico 2015)

Flexible Schedules? Maybe.

- Employer cannot cite punctuality as essential function when they had previously allowed employees to use banked time.
McMillan v. City of New York (2nd Cir. 2013);
Solomon v. Vilsack (D.C. Cir. 2014)

Need for expertise – examples

Do reasonable accommodations include . . .

Changing managers? Generally not.

- Especially where the distress comes from the manager holding the employee to expectations.

Schwarzkopf v. Brunswick Corp. (D. Minn. 2011);

Tomlinson v. Wiggins (W.D. Ark. 2013).

Occasional absences for employees who cannot demonstrate regular attendance? Depends.

- When erratic attendance affects the employee's essential functions.

Mecca v. Florida Health Services Center (M.D. FL 2014); Basden v. Professional Transp. (7th Cir. 2013)

- Although attendance was important, it was not essential.

EEOC v. AT&T Corp. (S.D. Ind. 2013)

Thoughts and takeaways

- Many ways to solve these employer issues, but first, must know what issues you have. (e.g., ADA leaves)
- Issues you have are likely common and also areas of turbulence within the courts and other guidance.
- Keep up with changes in the law.
 - Over the past year, on average, approximately 2-3 important developments per week.
- Train your managers!
- Know whether you have intermittent issues (IBI benchmarking) and consider what options you have (and *don't* have) to solve for them.
- ADA leaves—be sure you're solving for what to do if the employee can't get back to work soon.



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Q&A



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Additional questions?

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