



**Date:** January, 2013

**Whitepaper:** Employee Absences, FMLA & Short Term Disability – Impact on Employers

**The problem:** *Most Small & Midsize employers don't have a full understanding of the impact and regulatory risks associated with Absence, FMLA, ADA, and integration with STD.*

*Recent, pending and proposed Regulatory changes requires employers to "pay more attention" to Leave Management and the impact on existing HR & Leave management policies and practices.*

**Social Leave** is a term you will hear more about in the next few years. Employees will have more opportunity to take "or use" (paid or unpaid) personal time away from work under State (possibly Federal) Family and Medical Leave programs to attend school, religious and family functions similar to what is currently allowed under USERRA, NDAA or other Federal Legislation covering Military Reservist and Veterans. To clarify, allowable time away from work will include incidental sick time, parent attendance at school conferences, religious services, family or employee counseling sessions, to provide care for an overage dependent or other family member and similar activities. Currently, there are 19 states with pending or existing State Leave Programs that provide either "paid" or unpaid time away from work, expanding employee eligibility and/or types of leave allowed. Paid leave will potentially be an additional employer (in some states employee) payroll tax – similar to an employer's Unemployment or Social Security Tax.

In 2012, the Department of Labor included \$23 million in its budget to fund States, who are investigating State sponsored Family Leave Programs. We are moving closer to the European model of providing employees with opportunity for more unpaid / paid time away from work, i.e. "Social Leave".

#### **Absence - Impact on productivity.**

According to a recent Mercer Survey, "*The Total Financial Impact of Employee Absences*," the total cost of absence can equal as much as 36% of payroll (compared to 15.4% for health care coverage); planned absences, like vacations and holidays, average 26.6% and 9% accounts for unplanned absences. For a midsize business, unplanned absence can cost \$4.5 million dollars per year.

Unplanned absences, casual sick days as example, result in the highest per-day productivity loss, 21% versus just 15% for planned absences like vacation days. On average, each employee has 5.3 unplanned absence days per year.

Employers must consider both the direct and indirect costs incurred when an employee is absent. Direct costs are the benefits paid to the employee; they include sick, holiday vacation pay health care and disability benefits, if offered by the employer.

The real impact, and most often not tracked, is the indirect cost. These costs are typically ignored, and are poorly tracked but significantly affect the employer's bottom line. The challenge is how to identify and quantify the indirect expense impact associated with unplanned absences:

- How the employee's absence affects coworkers and slows down a project's completion.
- How the absent employee's work is "covered" by coworkers, a temporary worker, "floaters," or the employee's supervisor.

Replacement workers are less efficient:

- 71% as efficient during unplanned incidental absences
- 79% as efficient during planned absences
- 80% as efficient during extended absences
- The work output of 4 to 8 co-workers is reduced by 19%



## **Managing Versus Tracking Absences**

An employer's second highest expense (payroll being number 1) is most often the total cost of employee absence. Most companies don't have an absence management program in place to identify patterns of absences nor do they have the ability to determine ways to reduce expense associated with absences. A successful absence management program identifies individual trends, reasons for absences, the labor impact, the impact on business operations (overtime cost, missed/delayed shipments, quality or performance deficiencies), and identifies "proactive steps" to reduce or to accommodate employee absence from work, the associated expense, and measures the success of absence management improvement activities.

To summarize, an Absence Management program "manages" employee leave activity by identifying the cost of employee absences, the reasons for those absences, flagging any associated trends, and identifies and implements the steps/action items to solve problems and reduce expense associated with employee absence.

## **The FMLA & ADA**

The FMLA is administered by the Wage and Hour Division (WHD) of the Department of Labor (DOL) and the ADA is administered by the Equal Employment Opportunity Commission / Department of Civil Rights (EEOC / DCR) both are represented at the Federal and State Level (and in some states, at the municipal level). The DOL enforces the strict compliance issues with regard to the FMLA including, failure to notify employee of their rights, failure to provide (timely) notices or denial of FMLA Employee Rights. FMLA Retaliation Claims and Discrimination Claims may also be presented to the EEOC/DCR. The DOL may at any time, from first report of an alleged FMLA violation, or anytime during the investigation, assign the claim to Private Legal Counsel (through an arrangement with the National/State Bar Association). The assigned attorney will work and be compensated by the State/Fed DOL for their representation. Additionally, this private attorney may bring forth other alleged employer violations.

The Americans With Disability Act As Amended (ADA) is enforced by the Fed/State EEOC/DCR. There have been several court decisions which have impacted on how the FMLA is interpreted with regard to determining employee rights under FMLA (State or Federal). Additionally, under the ADA, allowing "additional leave" time is considered a "possible" accommodation for an ADA qualifying disability as a return to work accommodation. What this means is that strict adherence to a "no-fault" attendance policy at the conclusion of a continuous, or intermittent, FMLA leave may not be applicable. Additional time away from work will be considered as potential accommodation for a qualifying ADA mental or physical impairment.

Several court decisions have changed the way in which the FMLA will be interpreted and enforced:

- EEOC's increased attention to employer's obligations to provide more leave than the FMLA requires as a reasonable accommodation under the ADA;
- The extension of retaliation protection to third parties such as close family members and fiancées;
- The addition of "cat's paw" liability, holding an employer liable when an unbiased manager bases his or her employment decision on the recommendation of a biased manager.

Changes to the ADA regulations result in more individuals having covered disabilities and will qualify for protection under the ADA. Employers need to change their thinking from determining if an employee's condition is ADA qualifying. The ADA defines a disability as being known or being perceived as being disabled. What this means for employers is that they need to confirm that a disability exists but then engage in an "interactive process" to accommodate, if possible, the employee so that they can perform the essential job functions of their job. If the employer does not have a job description or has not identified the essential job functions for a position, the DCR will ask the employee to identify their essential job functions, they will look to help wanted ads / job postings or use other methods to determine what are the essential job functions for the position – We encourage employers to review and update job descriptions, identifying essential job functions.



We also encourage employers to use an “interactive process” to see if there’s an effective accommodation that will allow an employee, having a ADA qualifying disability, to perform the essential functions of their job. The DOL has created the “Job Accommodation Network” (JAN), <http://dol.gov/odep/resources/JAN.htm> . JAN is an excellent resource for obtaining forms and procedure documents to initiate and document the employer’s actions with regard to the “interactive” ADA job accommodation process – working with the employer.

According to EEOC, the primary focus in ADA violation cases will be on the process undertaken by the employer to accommodate an employee having a Disability and whether, or not, discrimination occurred. The EEOC states that determining if the employee has a disability meeting the definition of the ADA “should not demand extensive analysis.”

Employers need a better understanding of the relationship between FMLA Return to Work requirements and the ADA. If the condition is ADA qualifying and the employee’s Health Care Provider indicates that the employee’s condition will be controlled such that they are able to return to work in 14 weeks (exceeding the 12 weeks of FMLA Leave). The employer chooses to terminate the employee for failure to return from an FMLA Leave and the employee files a claim; there is possible ADA violation for “failure to accommodate”. **(2 Examples)**

**1.) Employee suffers a broken leg in a car accident.** *Employee is cannot return after 12 weeks of Family Medical Leave but prognosis is that the employee will have full recovery and able to return after 16 or more weeks (with or without restrictions). This situation does not qualify as ADA since the medical condition (most likely) does not qualify as a disability (under the ADA). The employer can choose to terminate the employee’s employment for failure to return (with our without restrictions) from 12 weeks of FMLA leave.*

**2.) Employee suffers from cancer** – *Assuming the cancer is ADA qualifying. The individual is severely impacted by radiation and Chemo treatments and cannot be at work. Treatments are expected to last 14 weeks and it is anticipated that the employee will be able to return to work (with or without restrictions) at that time. At the end of the 12 weeks FMLA, the employee is not able to return to work but the employee’s health care providers advises that the employee will be cleared to work a regular schedule with accommodations. Possible additional rest periods, allowed time for medication, must not stand or walk more than 25% of the scheduled 8 hour workday; employee cannot work more than 8 hours daily, 40 hours weekly. In this scenario – to terminate the employee at the end of the 12 week FMLA Leave will possibly be in violation of the ADA as a failure to accommodate. The EEOC may view the termination as a potential breach of employee rights.*

*The EEOC would not spend a significant amount of time (or effort) determining “if the condition qualifies” i.e., the condition is cancer- respiratory and Circulatory system affected – lifetime condition. The question is why did the employer terminate rather than accommodate knowing that the employee was scheduled to return to work in two weeks beyond FMLA? What hardship is encountered by the employer and what accommodations did the employer consider prior to making the decision to not return to the employee to his/her current position, “or similar, or alternative position” – perhaps a lesser paying position?*

The possible, perhaps appropriate, employer response in example 2 is to end the FMLA Leave and place the employee on an extended medical leave (for two – or up to 4 weeks). Inform the employee that you are placing them on extended medical leave, understanding the employee is able to return to work (with or without restrictions) in two weeks as an accommodation under the ADA, and to please keep them informed as to their availability to return to work. If the employee is not able to return to work at the end of the two (or four) week period, the employer has made a reasonable attempt to accommodate the employee to allow them to return to work. The EEOC will look at this as the employer’s effort to allow the employee to return – Since the employee is not able to return as previously thought, the employer may then take action to term the employee. We advise employers to handle this process in writing and to inform the employee that due to the employee not being able to return to work as previously determined by their Health Care Provider, that their position with [company name] has ended effective end of



business [day/date]. Inform the employee and them to please keep the company informed on their availability to work and that the company will consider them for employment in a position suitable to their background and experience with or without accommodation.

### **FMLA and Short Term Disability (STD)**

To start with, not all STD is FMLA and not all FMLA is STD qualifying. Employers often make common mistakes and fail to provide appropriate documentation and follow FMLA State/Federal time lines and process, which results in EEOC/DCR claims and lawsuits when relying on documents related to the employee's STD claim. To start with, STD is an employee only benefit and does not extend to family members. Therefore, it is not uncommon for FMLA qualifying family events (Spouse, son, daughter, parent) to not be appropriately processed. Employees qualify for STD based on employer policy – full time status with 90 days employment (as example). Fed FML requires 12 months employment with at least 1250 hours in the most recent 12 month period. Employers having less than 50 employees (fed requirement) may offer STD benefits and are not required to meet Fed FMLA Regulatory Compliance.

Employer's frequently make mistakes by "enacting" the FMLA for non-qualifying employees and therefore create an FML obligation when one did not exist. As example, advising an employee (having only 4 month employment) that their medical condition qualifies as FMLA has "invoked the FMLA and obligates the employer to follow FMLA Regulations. If the employee is provided with the "required" Employee Rights and Responsibility Notice, completes the Employee/Family FMLA Leave Request Form (FMLA 380E or 380F Form) and the process is timely (meeting regulatory timeline requirements) then a valid determination as to whether (or not) the employee qualifies under the FMLA can be conducted and documented. At the same time, the STD eligibility process can be followed.

Accepting the STD documents as FMLA may not be the best answer for the employer and employee. STD will conclude after a specified period of time that may or may not coincide with the employee's remaining FMLA Leave balance. FMLA may end at the time the employee returns to work or may continue as FMLA Intermittent Leave". Many Employers require employees use any available Paid Time Off concurrent with FMLA Leave. STD policy may only require (or not require) use of Any Paid Time Off during the waiting eligibility period prior to receiving STD benefits.

Applying a single uniform system with the expectation that the FMLA and STD will be administered appropriate to regulation and employer policy will result in discrepancies and greater risk exposure for failure to comply with required FMLA regulations.

### **Understanding the Risk and what employers need to Consider**

Employer Awareness and Management understanding of employment practice regulations is a key to successfully reducing risk, fines and possible litigation.

#### **Recommendation – Steps to follow**

1. **Education for Line Managers** – Conduct "Supervisor/Manager Regulatory Compliance Training annually, in not feasible - minimally every 18 months, documenting the training program and who attended.
  - a. Topics include
    - i. ADA
    - ii. FMLA
    - iii. Employee Rights
    - iv. Harassment & Discrimination
    - v. Wage & Hour Regulation requirements
      1. Overtime laws
    - vi. New Hire - Interview Procedures
    - vii. Performance Review process / Practice
    - viii. Uniform Employee Disciplinary Action



ix. Handbook Policies

**2. Human Resources Responsibility**

- a. Full awareness of Employee Absence & Leave Management
  - i. Impact of unscheduled absence on the organization
    - 1. Employee patterns/frequency
    - 2. Associate direct and indirect cost identified and tracked
  
- b. Full awareness of FMLA Regulatory Compliance- Employer/Employee Responsibility
  - i. Eligibility
  - ii. Notices & Timelines mandated by the DOL
    - 1. Rights and Responsibility Notice
    - 2. Eligibility
    - 3. Postings
  - iii. FML Absence/Leave Tracking
    - 1. Intermittent Leave
      - a. Patterns/duration
    - 2. Continuous Leave
      - a. Tracking Method
      - b. End of leave Process
    - 3. FMLA certification
      - a. Annually / First event following 6 months
  - iv. Return to work (RTW)Requirements
    - 1. Same as other Medical leave requirements
      - a. Workers' Compensation
        - i. Light Duty/FMLA Light Duty?
      - b. STD – Return to Work
      - c. Personal Medical Leave
    - 2. Verify FMLA policy/Handbook
- c. **ADA Compliance**
  - i. Understanding updated Regulation impact on business
  - ii. Accommodation Requirements – Individual Assessments
    - 1. Procedure & Documentation
- d. Risk Management
  - i. Conduct HR audit to determine Risk exposure
    - 1. Assess employer liability - risk associated with HR practice or omissions
  - ii. Determine best Practice to reduce risk
    - 1. In-house processes
    - 2. External/outsource services
      - a. Expense / ROI
      - b. Value Added

**Summary**

Business Owners and Executive Leadership need to prepare for increased employment practice regulatory risk exposure in as it relates to the Employer responsibilities affecting worker rights. Employers have a responsibility to assure that employees know their rights and that Line Management, working with Human Resources, follow State and Federal Regulatory requirements.

A higher number of employee claims are expected with enforcement being through the DOL and EEOC at the State / Federal Level. The first line of defense is adequate policy, procedures and documentation of activities uniformly applied to all workers. Failure to provide Management Training, documentation identify employer action on individual matters / claims will most likely have a negative impact on the DOL/EEOC investigation which may result in fines/penalties and monetary awards for the employee who filed the claim and/or groups (class) of employees within your organization



## About the Author

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**Joe Aitchison, SPHR**, is Vice President of BASIC, a HR Service Company providing employer solution in the area of human resources and benefit administration. Services include payroll, unemployment, COBRA, FLEX, FMLA and HR outsource services. In his current role, Mr. Aitchison is responsible for regulatory compliance and is BASIC's resident expert on employment practice and benefits. He provides guidance on HR best practice to BASIC's 9,000 clients nationally. He is a known, frequent national speaker at conferences, presenting on "Employer Best Practice", Health Care Reform, employee benefits, FMLA and employment related federal regulations.

Mr. Aitchison has obtained a life time certification as a Senior Professional in Human Resources. He has thirty years of human resource and business management experience working with international automotive manufacturing, commercial manufacturing, warehouse and distribution, transportation, retail, gaming & hospitality, food processing, healthcare, legal, financial services, engineering & scientific professional services and not for profit organizations. Positions held include: CEO/President, senior executive, operations management and company director. Mr. Aitchison servers as a board member on several profit and not for profit boards