Absence, Leave and Disability Management: A Roadmap to Improve Your Leave Program and Enhance Compliance with State & Federal Law

Amy L. Blaisdell, Esq., apb@greensfelder.com
Eric K. Eickmeyer, Esq., eke@greensfelder.com
Greensfelder, Hemker & Gale, P.C.
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**Housekeeping Items**

- All phones are muted
- Dial *0 at any time for technical support
- Questions may be submitted to the presenter via the Chat feature on the left-hand side of your screen
- Questions will be answered at the end of the presentation
Absence, Leave & Disability Management Priorities

- Top management priorities in absence management – 46%
  - Reducing impact of absence on business operations &
  - Improving the process for FML administration
- 31% of employers report that they have trouble evaluating the clinical reasons for leaves
- 8% of employees take FMLA leave in any given year
- For every $1 spent on payroll, 13 cents on paid absences

Mercer - Survey on Absence and Disability Management 2010
Audience

- How would you rate your knowledge of Americans with Disabilities Act?
  - Good
  - Fair
  - Poor

- How would you rate your knowledge of the Family and Medical Leave Act?
  - Good
  - Fair
  - Poor

- How would you rate your knowledge of your state’s workers’ compensation act?
  - Good
  - Fair
  - Poor

- How would you rate your knowledge of the Employee Retirement Income Security Act?
  - Good
  - Fair
  - Poor
Audience

- How would you rate your knowledge of the overlap between the ADA, FMLA, Workers' Compensation & ERISA?
  - Good
  - Fair
  - Poor

- How do you feel about your ability to resolve an employee situation that may be impacted by more than one law?
  - Confident
  - Generally okay
  - Anxious
  - Overwhelmed
Key Takeaways

1. Discuss the key laws impacting leaves of absence ("LOAs") - ADA, FMLA, State Workers’ Compensation Acts and ERISA

2. Provide a Roadmap for navigating the overlapping provisions.

3. Share tools to help you reduce the impact of absences on the workplace.
The Bermuda Triangle

Family and Medical Leave Act

- ERISA
- Americans with Disabilities Act
- State Workers’ Compensation Acts
Americans with Disabilities Act (ADA)

- Prohibits employers from discriminating against a qualified individual with a disability because of disability of such individual.

- Covers private employers with 15 or > employees.

- Doesn’t preempt other federal and state statutes so could be subject to ADA, FMLA, state leave laws, ERISA and state workers’ compensation act at the same time.
ADA

- Protects any “qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions” of the employment position held or desired.

- Disability:
  - physical or mental impairment
  - substantially limits
  - one of more of the major life activities of such individual
So what is a “Disability”?

- ADA Amendments Act (the “ADAAA”) 1/1/09
  - disability shall be construed in favor of broad coverage of individuals under this chapter.
    - 42 U.S.C.S. § 12102(4)(A); 29 C.F.R. § 1630.1(c)(4)
- Substantial Limitation
  - EEOC has further explained that the "substantially limits" requirement is to be construed broadly in favor of expansive coverage and is not meant to be a demanding standard.
    - 29 C.F.R. § 1630.2(j)(1)(i)
Major Life Activities

- Shall not be interpreted strictly to create a demanding standard for disability. **29 CF.R. § 1630.2(i)**
  - caring for oneself,
  - performing manual tasks,
  - seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working
  - operation of major bodily function (functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.)
Reasonable Accommodation

- Must make “reasonable accommodations”
- Unless can demonstrate doing so would cause undue hardship.

May include:

- Permitting use of paid leave
- Providing additional unpaid leave
- Flexible work schedules
- Reassignments to vacant position
- Part-time schedule
- Intermittent Leave
Family and Medical Leave Act of 1993

- **Covered employer** must provide an **eligible employee** with up to 12 weeks of unpaid leave during any 12 month period for a **qualified reason**.

- **Covered Employer** - 50 or more employees (including part-time employees) for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.
FMLA – Covered Employee

- 12 months of employment, AND
- 1,250 hours worked in the last 12 months, AND
- 50 or more employees work at the employee’s worksite or other worksites within 75 miles.
FMLA - Basic Leave Entitlements

1. For incapacity due to pregnancy, prenatal medical care or child birth, OR
2. To care for the employee’s child after birth, or placement for adoption or foster care, OR
3. To care for the employee’s spouse, son, daughter, or parent with a serious health condition, OR
4. Employee’s own serious health condition that makes the employee unable to perform his or her job.
FMLA - Military Leave

- **Qualifying Exigencies** - Employees with a spouse, son, daughter or parent, or “next of kin” on active duty or call to active duty status in the National Guard, Reserves or Armed Forces is deployed to any foreign country may use their 12-week leave entitlement to address qualifying exigencies.

- **Care for a Covered Service Member** - Up to 26 weeks of leave to care for a covered service member during a single 12 month period.
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either:

1. Overnight stay in a medical care facility, OR
2. Continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee’s job or prevents the qualified family member from participating in school or other daily activities.
The “continuing treatment” requirement may be met by:

1. More than 3 consecutive calendar days of incapacity + at least 2 visits to a health care provider, OR
2. More than 3 consecutive calendar days of incapacity + 1 visit to a health care provider + a regimen of continuing treatment, OR
3. Incapacity due to pregnancy, OR
4. Incapacity due to a chronic condition, OR
5. A period of incapacity that is permanent or long term, OR
6. Any period of absence to receive multiple treatments.
Workers’ Compensation Acts

- Provide **benefits** to employees whose injuries are job-related, for income replacement and medical and rehabilitation expenses benefits, **regardless of** whether the employer or employee is at fault.

- Governed by state law, differ from state to state.

- In general, provide for **benefits** to compensate for injury.

- **MO and IL Acts do not mandate leaves of absence.**
Types of Benefits

- Temporary Total Disability (TTD) – Compensation for a period of time when the employee is taken off work from an authorized medical care provider due to work injury.

- Temporary Partial Disability (TPD) – Limited benefit paid for a period of time when the employee is able to return to work but not at full duty or for the full number of regularly scheduled hours per week. Limited to 2/3 of the difference between what the employee was earning prior to the injury and what the employee will be earning during light duty.
Workers’ Compensation Acts

- **Permanent Partial Disability**
  - Compensation for the residual disability suffered by the employee as a result of the underlying work injury.
  - Comparing on a scale of 0 to 100 someone who is completely healthy to whatever condition that person is in with that body part. i.e. Carpal Tunnel

- **Permanent Total Disability**
  - Medical care provider has opined that employee cannot return to work at all in any position.
“Employee welfare benefit plan” and “welfare plan” mean:

- any plan, fund, or program established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries. . .

- (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits . . .
ERISA

➢ Today talking about short and long-term disability plans

➢ Covered participant may file a claim for benefits

➢ After exhausting appeal rights under plan(s), may file suit to recover benefits under the plan, to enforce rights under the plan, or to clarify rights to future benefits

➢ ERISA does not mandate LOAs but often overlaps with other policies – i.e. FMLA and other LOA policies
A Roadmap to the Overlap

Application of ADA, FMLA, Workers’ Compensation and ERISA
Which laws might apply in this situation?

Is this associate covered by:

- ADA, and/or
- FMLA, and/or
- WC, and/or
- ERISA (short-term or long-term disability), and/or
- State leave laws

- Following have state family medical leave laws for private sector employees: CA, CO, CT, DC, HI, IA, KY, LA, ME, MD, MS, MN, MT, NJ, NY, OR, RI, TN, VT, WA, WI
Which laws might apply in this situation?

- **Rules of the Road**
  - An employer may be covered by ADA, FMLA and state workers’ compensation act at the same time.
  - An employer may be covered by ADA, FMLA and ERISA at the same time.
  - An employer will not be covered by WC and ERISA at the same time. ERISA governed STD/LTD Plans carve out workers’ compensation.
  - When there is coverage under multiple laws, ADA and FMLA expressly state that the law granting the greatest level of protection will govern. Typically ADA or FMLA will provide the greatest level of protection among the laws discussed today.
Example 1

- Employee (employed for less than 1 year) is pregnant and is put on bedrest by her physician for 3 weeks, 2 months before she is due to deliver.

  ✓ Employee is NOT entitled to Leave under the FMLA.
  ✓ Employee may have a disability under ADA (ADAAA).
  ✓ Employee may also be eligible for short-term disability benefits under employer’s STD plan and if so may be covered by ERISA.
Example 2

- Employee is employed in a factory as a production tech. Her job is to package diapers. She had surgery for carpal tunnel, which she claimed was work-related. She was out of work for the surgery. She returned to work light duty. After 180 days she has reached maximum medical improvement but is still unable to perform her packaging job.

- Employee received FMLA for surgery.
- Employee received benefits under the state workers’ compensation act.
- Employee was not eligible for STD benefits.
- Employee is seeking continued light duty work under ADA.
What notice must my employee provide?

- **FMLA Roadmap**
  - Foreseeable: 30 days notice.
  - Unforeseeable: As much notice as is practicable under the circumstances.

- **ADA Roadmap**
  - No Magic Words are Required to Request an Accommodation.

- **WC Roadmap**
  - Employee has an obligation to report to supervisor or may lose benefits and may be subject to discipline.

- **ERISA Roadmap**
  - Deadlines are specified in the applicable plan or policy.
What notice must the Company provide?

- **FMLA Roadmap**
  - Eligibility Notice – w/i 5 business days of request for FMLA.
  - Notice of Rights and Responsibilities sent with Eligibility Notice.
  - Designation Notice within 5 business days of receipt of all documentation.

- **ADA Roadmap**
  - No written response required.

- **WC Roadmap**
  - Must file report of injury (MO)

- **ERISA Roadmap**
  - Written determination must contain specific information contained in ERISA’s claims handling regulations including basis for denial, appeal right and name of any medical professional consulted.
    - 29 CFR § 2560.503-1.
What medical information can I obtain?

Questions:
✓ Do I have all necessary medical certification?
✓ Am I entitled to get medical information that I am lacking?
✓ Do I want the medical information that I am lacking?
✓ Do I have the right to require a medical examination?
✓ Have I satisfied my duty to keep medical information separate from other information?
What medical information can I request?

- **ADA Roadmap**
  - Must be “job related” and “consistent with business necessity.” *(must be required for assessment of whether individual can perform the job.)*
  - If disability and need for accommodation not apparent, may require employee to obtain physician’s response to following questions:
    1. Describe any impairment or restriction to the employee in performing the essential functions of the position;
    2. Describe the nature, severity and anticipated duration of any such impairment or restriction;
    3. Describe any accommodations that will assist the employee in performing the essential functions of the employee’s position; and
    4. Specify the anticipated duration of the need for each such accommodation.
What medical information can I request?

- **FMLA Roadmap**
  - May request medical certification to determine that leave is due to serious health condition within 5 business days of request.
  - May request recertification, but generally no more than every 30 days, unless: (29 C.F.R. 825.308)
    - Circumstances described by the previous certification have changed significantly, OR
    - You receive information casting doubt on the associate’s stated reason for leave.
  - At a minimum, you can request recertification every 6 months in connection with an associate’s FMLA leave for a serious health condition. 29 C.F.R. 825.308.
  - May require a new medical certification with the first absence in a new 12 month leave year, including the right to seek second and third medical opinions. 29 C.F.R. 825.305(e).
What medical information can I request?

➢ **WC Roadmap**
  - May make medical inquiries.
  - May require use of Company’s own WC doctor.
  - HIPAA carves out Workers’ Compensation.

➢ **WC/FMLA Roadmap**
  - If employee is on FMLA running concurrently with WC absence and WC statute permits employer or employer’s representative to request additional info. from the employee’s WC health care provider, FMLA doesn’t prevent employer from following the WC Act and information obtained under the Act may be considered in determining entitlement to FMLA leave. 29 CFR 825.306.
What medical information can I request?

➢ **ERISA Roadmap**
  - May collect whatever information is necessary to make determination of eligibility for benefits under short-term or long-term disability plan.

➢ **ERISA/FMLA Roadmap**
  - An employer may use additional information provided in connection with a paid leave policy or disability plan, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of the paid benefits. 29 CFR 825.306.
Can I require a medical examination?

- **ADA Roadmap**
  - Does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer's choice if the employee provides **insufficient documentation** from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation.
  - Employer should explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner.
  - Employer should consider consulting with the employee's doctor (with the employee's consent) before requiring the employee to go to a health care professional of its choice.
Can I require a medical examination?

**FMLA Roadmap**

- If you have reason to doubt the validity of a medical certification may require that the associate obtain a second opinion from a health care provider chosen by the Company at the Company’s cost. Associate is entitled to take FMLA leave pending the second opinion.

- If the first and second opinions differ, may require the associate to obtain a third opinion at Company’s expense. For third opinion, the health care provider is chosen by the employee and employer and is final and binding.
Can I require a medical examination?

- **WC Roadmap**
  - Yes. State Workers’ Compensation Acts generally provide for medical examinations conducted by a physician selected by the Company for purposes of receipt of Workers’ Compensation benefits.

- **ERISA Roadmap**
  - In general, short and long-term disability benefits generally always reserve the right to have an independent examination.
  - Claims adjudicators are not required to give the opinion of the participant’s treating physician more deference or weight than that of an independent reviewing physician.
Do I want to require an examination from a physician retained by the Company?

Roadmap

- **ADA** – Maybe. You should consult with the physician that you are considering selecting so that you have some idea whether you want his/her opinion or not.
- **FMLA** – Probably so. If you forego the opportunity to get a second or third opinion, you are not able to get one until the employee enters a new leave year.
- **WC** – Always. The examining physician should always be the Company doctor.
- **ERISA** – Generally, yes. If your plan retains the right to do a medical examination but you don’t exercise it, this is sometimes held against the plan in litigation.
Can I ask what prescriptions the employee is taking?

Roadmap

- **ADA** - Generally, no. EEOC takes the position that asking an employee about his/her use of prescription medications is not job-related and consistent with business necessity. However, there may be exceptions.

- **FMLA** – Medical facts on a Certification must be sufficient to support the leave. “Such medical facts may include . . . whether medication has been prescribed . . .”

- **WC** – Yes. Most workers’ compensation laws require the employee to provide the employer access to medical records in order to receive benefits under the Act.

- **ERISA** – Yes. The Claims Administrator can require that the participant provide treatment records, which include prescription information.
Do I have to hold this employee’s job?

Roadmap

- **ADA** – Employee entitled to position held prior to leave unless position is no longer available because it would have been undue hardship to hold it open.

- **FMLA** – Entitled to job protection for 12 weeks.

- **WC** – In MO and IL no job protection, but there is a cause of action for retaliation for filing a WC claim. Cannot terminate someone because they filed a claim.

- **ERISA** – No job protection. (However, must still comply with FMLA and ADA to the extent applicable.)
Example 3

- Employer has a hard deadline of terminating associate after 6 months of receiving benefits under the Company disability plan. The rationale is that associates have exhausted their FMLA time, have exhausted STD and now are in a period of long-term disability.

- Is this practice lawful?
Is the employee entitled to light duty?

➢ Roadmap

- **ADA** – Does not require an employer to create light duty; does require to accommodate by eliminating marginal job functions.

- **FMLA** – If employee requests FMLA, employer cannot require employee to take light duty instead.

- **WC** – MO and IL do not require light duty but providing light duty does cut off the cost of providing TTD benefits.

- **ERISA** – Short or Long-Term Disability Plan may, in employer’s discretion require an associate to participate in a return to work program that offers light duty and provide that employee will forfeit disability benefits under the plan if he/she declines.
Does this absence count under the Attendance Policy?

Roadmap

- Absences under FMLA, ADA, WC may not be counted under no-fault attendance policy.

- Most attendance policies include a carve out for FMLA and WC but many forget about the ADA.

- In last few years, employers’ failure to scrutinize whether absences could be covered by the ADA has cost companies tens of millions of dollars to settle claims brought by the EEOC.

- No Fault Policies put a target on employers’ backs and should be replaced by discretionary policies.
Tools to Reduce Impact

Steps to Take to Improve Leave Administration Process – Focusing on Intermittent FMLA
Intermittent FML Tools
Train Supervisors to Require Notice

✓ Supervisors need to know what they can say
✓ Planned / foreseeable treatment and appointments
  - Must provide 30 days notice of need for leave.
  - Schedule treatments or appointments before or after work, if possible.
  - If not possible, consult with supervisor prior to scheduling medical treatment or appointments in order to work out a schedule.
  - If fail to consult with employer, may require employee to make alternative arrangements (subject to the approval of HCP).
✓ Unforeseeable leave
  - Must provide notice “as soon as practicable”
  - Must follow usual call in procedures
  - If do not follow usual call in procedures, subject to discipline under regular employer rules
Require Written Notice of Use of IFML

- Employee must submit a Notice of Use of IFML by the close of the next business day following use of IFML stating that the time missed was for IFML.

- Prevents associate from calling in saying that they had car problems and then subsequently claiming time off was for FML.
Require a Complete Certification of Healthcare Provider

- Which specifies projected number of treatments, dates, and the projected recovery period after each treatment.
- Advise employee in writing what additional information is necessary.
- 7 days to cure deficiencies, unless such time period is not practicable under the particular circumstances despite the employee’s diligent efforts.
- If deficiencies are not cured, deny FMLA leave.
If Certification states that the Employee will need to be absent 1 day a week for 6 weeks to undergo medical treatment, leave taken by the employee should be reviewed and compared to the Certification to make sure that the employee does not use the intermittent FMLA in excess of what is provided for in the Certification.
Obtain Recertification As Often As Permitted

- Minimum of Every 30 days
- Maximum of Every 6 months
- Know the Exceptions
  - Employee Requests Extension
  - Circumstances described in prior certification have changed significantly
  - Information casts doubt upon stated reason for the absence or the continuing validity of the certification
Require a Second or Third Opinion

- If you have reason to doubt the validity of the Certification of Health Care Provider, require a second or third opinion.

- You can’t a second or third opinion for a recertification.
Require that Associates Exhaust PTO

Associates are less likely to abuse FMLA if they know they will have to exhaust their PTO before taking unpaid leave.
Transfer the Associate to a Different Position During Planned IFML

- If employee is taking intermittent FMLA leave for planned medical treatments or appointments for the employee or a family member, you may transfer employee to a different position if doing so would be less disruptive to operations.

➢ Note the following:
  - Different position must have the same pay and benefits.
  - Transfer cannot be punitive
  - Transfer must be temporary.
ADA Tools
Adopt Discretionary Attendance Policy

- Replace No-Fault Attendance Policies with Discretionary Attendance Policies

- Benefits
  - Curbs misuse/abuse of FMLA
  - More defensible in event of claim of disability discrimination
Obtain Medical Information Before Filling Jobs

- Employers routinely struggle with how long and under what circumstances an employee’s job must be held.

- Many employers are mistakenly operating on the assumption that a job guarantee is 12 weeks at the outer limits under FMLA and then they may post and fill a position.

- Require employee to obtain information from physician at the end of FMLA to determine status and ability to perform job under ADA.
Document Accommodations Offered

- Not required to provide associate the accommodation that has been requested.
- Only required to engage in interactive process and provide reasonable accommodations.
- Make sure that HR documents accommodations that have been offered and declined.
Workers’ Compensation Tools
Workers’ Compensation Tips

- Be diligent in communicating with the claims adjuster.
  - Has most current RTW status.
  - Employer may require RTW.

- Benefits
  - Be prepared to understand limitations when employee returns
  - Stop lost time benefits (i.e. TTD)
  - Reduce premiums – less payout on TTD and medical
Workers’ Compensation Tips

➢ Obtain copies of treatment records in a timely manner in order to monitor the progress of the injured worker through treatment and be ready when worker returns.

➢ Employee has to sign release giving employer access to those. HIPAA does NOT apply to workers’ compensation.

➢ Benefits

 ✓ Know what accommodations need to be made to the work environment / job.
Bring it ALL Together!

➢ Have one department or administrator administer all leaves of absence to ensure that you have the most comprehensive information to make your decision.

➢ Inform employee that you will use medical gathered in connection with WC or STD to determine eligibility for FMLA.