JULY 2017 | VOL 9 NO 4

@work

Official Publication of Disability Management Employer Coalition

Integrated Absence Management

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DMEC Disability Management Employer Coalition

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Editorial Policy

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@Work welcomes submission of articles of interest to disability and absence management professionals at all levels. Instructions for submission are published online at www.dmec.org/work-magazine.

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Contact DMEC
800.789.3632
info@dmec.org
5173 Waring Road, Suite 134, San Diego, CA 92120-2705

Editor
Peter Mead, CPDM
editor@dmec.org
For all editorial questions

Layout & Production
Mark Jaquette

Editorial Review Panel
Skip Simonds
Linda J. Croushore, MEd, CRC
Steven M. Genduso, MA, CPDM
Fred Schott
Maranda Childress, SPHR
Thomas P. LeRoy, PT, MSErg

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MBA, CPDM, CCMP

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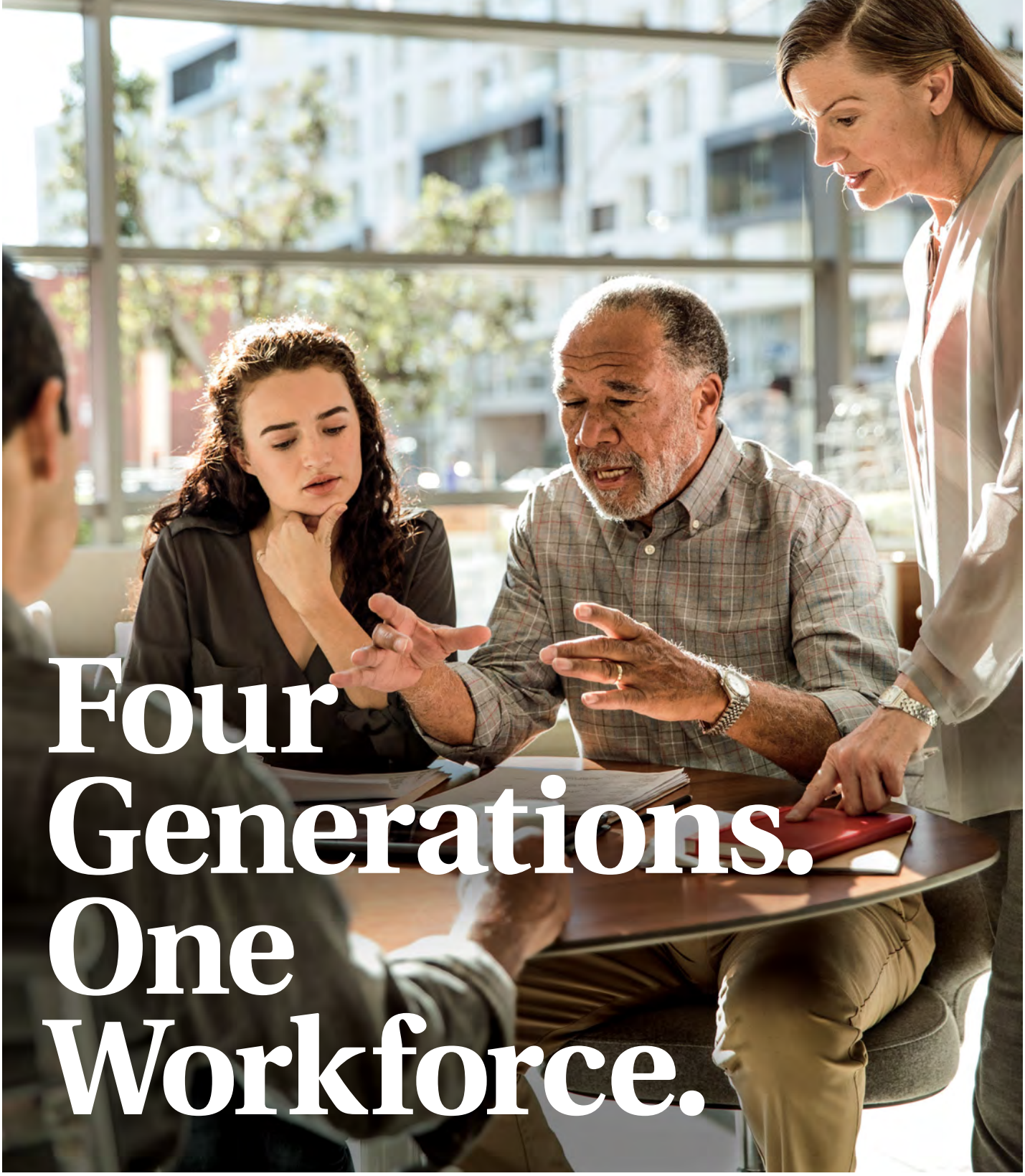
The Results Are In: Paid Parental & Family Leave Survey

During April and May, more than 300 employers participated in our pulse survey on paid parental and paid family care leave. The results from the survey, along with considerations and best practices, were presented in the *Tools and Tactics Webinar: Get Ready – Paid Family Leaves Are Coming* on June 22. **Access the results.**

Survey Results!



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Navigating life together

Terri Rhodes
MBA, CPDM, CCMP
President and CEO, DMEC

25 Years of Thinking "Outside the Silo"

The Disability Management Employer Coalition is celebrating 25 years of providing focused education, resources, and networking to absence and disability management professionals across the country. Our goal is to provide resources around integrated absence management (IAM) which empower employers, and the vendors who support them, to increase workforce productivity and reduce costs.

DMEC began its efforts around the integration of insurance silos, increased return to work, and integrated disability management. Over the last 25 years, this has expanded to IAM, which covers disability, leave, FMLA and ADA compliance, and employee well-being, health, and productivity programs. This comprehensive approach has moved organizations from managing just disability to managing absence in a consistent and compliant manner.

"There are many ways to integrate that allow departments to work autonomously yet together."

We have indeed come a long way:

- Numerous studies have highlighted the cost savings of integration, which is now universally recognized as a best practice for employers.
- The advanced programs of leading corporations showcase how integration can produce positive outcomes that result in a win for both the employee and the employer.
- Data integration was atypical 25 years ago; however, DMEC recognized it as a cornerstone of a good IDM program. Today, linking programs and data is standard operating procedure, giving organizations clear information about where they need to make improvements or changes.

With this much success, why is integration still only partially implemented or still on the wish list for so many employers? It is important to know the challenges to integration and be prepared to meet them.

Corporate competition. Even if you project excellent savings for an integration initiative, you must win capital and the support of corporate leadership to launch it. To secure your share of corporate resources, describe your projected savings in units that connect with your leaders' values, such as "these savings equal two weeks of production from our largest plant."

Complexity. Successful integration initiatives usually align a sequence of programs to support employees. This means managing a mountain of processes and data, which requires securing buy-in and cooperation from multiple programs and suppliers, and changing corporate culture. All of these activities must be accomplished in a limited time, before they are undermined by changes in the business cycle or other disruptions.

Organizational silos. This has long been the impediment to successful integration, while success comes from working together, not separately. Obviously, one department managing all programs is difficult to attain, but there are many ways to integrate that allow departments to work autonomously yet together. Many vendors now offer solutions to assist in the integration of return-to-work systems, data, and management reports.

"A journey of a thousand miles must begin with a single step." I have been using this quote for many years and find that it is still valid today. Figure out your first step and begin your integration journey. We have indeed come a long way over the last 25 years; let's see what can be accomplished in the next 25 years.

Terri L. Rhodes
DMEC CEO

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Compliance Memos

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CM #13 Supreme Court Expands Reach of ERISA Exemption

In June, the Supreme Court overturned three lower-court rulings that church-affiliated hospitals were subject to the Employee Retirement Income Security Act (ERISA). ERISA obligates private employers offering benefit plans to adhere to an array of rules related to reporting, disclosure, and fiduciary responsibility.

The Supreme Court unanimously ruled that a plan maintained by a "principal-purpose organization" (controlled by or associated with a church) qualifies as a church plan, regardless of who established it, and is therefore exempt from complying with ERISA. The case is *Advocate Health Care Network et al., v. Stapleton et al.*

Justice Sotomayor wrote a concurring opinion in which she noted that church-affiliated hospitals are some of the largest healthcare providers in the country, operate for-profit subsidiaries, and compete in the market with hospitals that must comply with ERISA. Congress may note these concerns and act to narrow the definition, but for now, church-affiliated organizations should be safe in claiming ERISA pre-emption. This ruling might also apply to church-affiliated schools. To learn more about this case, visit http://dmec.org/2017/06/16/supreme-court-expands-definition-church-plans/.

CM #14 State and Local Law Updates

Arizona. *Paid Sick Leave* began on July 1; paid sick time must be carried over to the following year, subject to usage limitations based on employer size. Non-Arizona employees are not included in total employee count. **New York**. *Paid Family Leave*: The NY Department of Financial Services has issued its regulations for the NY PFL, providing payroll deduction rates for employers. The program began funding on July 1 and begins paying benefits on Jan. 1, 2018. **Pennsylvania**. *Pittsburgh Paid Sick Days*: The City has announced it will appeal a recent court decision that the City did not have the authority under state law to enact its Paid Sick Days Ordinance.

California. *Day of Rest*: In the case of *Mendoza v. Nordstrom*, California's Supreme Court held that employees who are fully notified of their rights may voluntarily forego the legally required day of rest. *Minimum Wage*: Several jurisdictions increased their minimum wage on July 1, including: Emeryville, Los Angeles (City and County), Pasadena, Sacramento, San Francisco, and San Leandro. *San Francisco Paid Parental Leave*: New FAQs clarify that to receive the City benefits, employees must also apply for the California Paid Family Leave benefits. To learn more about any of these state and local laws, visit http://dmec.org/2017/06/02/june-2017-state-and-local-law-update/.

CM #15 10th Circuit: FMLA Notice Requirements Reduced in Some Cases

In *Branham v. Delta Airlines*, the 10th Circuit Appeals Court found that Delta successfully proved the plaintiff was dismissed for reasons unrelated to any Family and Medical Leave Act (FMLA) entitlement. The case had two employer-friendly findings: the more an employee exercises FMLA rights, the more she is expected to know those rights, so notice requirements will be enforced less strictly on the employer; and, an employee on a final warning who violates a notice-of-absence policy cannot use the FMLA to avoid discipline. This gives employers some cover in regard to FMLA notices inside the 10th Circuit, but employers may be able to avoid litigation altogether if they comply with all the notice requirements. To learn more about this case, visit http://dmec.org/2017/05/25/10th-circuit-holds-employee-fmla-experience-high-standard/.

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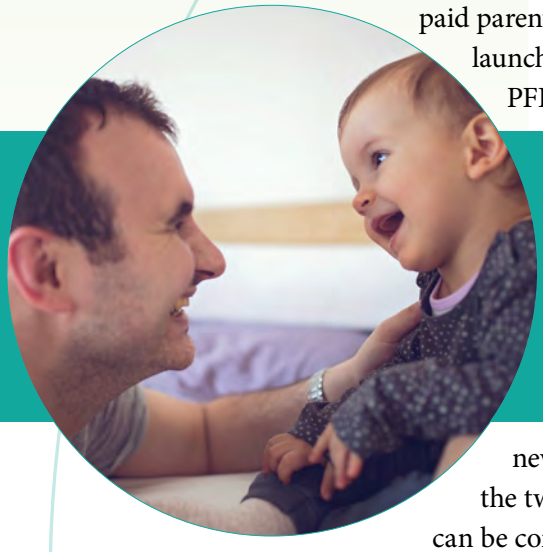
Popular, Complex New Benefit: Paid Family Leave *Makes Work Flexible*

Some employers are providing paid family leave (PFL) as a popular addition to employee benefit packages, and are finding that it can help improve employee engagement and productivity.

While large employers in technology, finance, consulting, and legal are leading the charge, other industries and smaller employers are beginning to offer PFL as well. Historically, paid parental leave (PPL) was the launching point that evolved into PFL with broader benefits. The news media frequently discuss the two interchangeably, which can be confusing.



"Caregiving is evolving...both men and women of all generations face challenges in meeting the demands of work and life... gender- and generation-neutral caregiving support programs... positively impact the economy, worker productivity, and business."

PFL is a complex benefit with multiple factors affecting cost and perceived value to employees:

- *What family leave purposes are covered?* Options include: bonding at birth or adoption; caring for parents; caring for spouses; caring for children; personal healthcare; domestic abuse or stalking response; and military family leave.
- *What is the level of mandated wage replacement?* State PFL and local laws vary as to percentage of wage replaced, and the maximum cap on total weekly benefits. States offering PFL include California, New Jersey, Rhode Island, New York (beginning Jan. 1, 2018), and District of Columbia (beginning July 1, 2020). Employers have more freedom to design custom PFL packages for their employees if unaffected by these jurisdictions or similar municipal laws.
- *What is the duration of the benefit?* In Rhode Island it's four weeks, in California and New Jersey it's six weeks, and New York begins at eight weeks and will reach 12 weeks by 2021. In these four states, the program builds on state temporary disability insurance programs. The District of Columbia will require from two to eight weeks depending on leave purpose. U.S. corporate benefits run as high as 20 weeks of PPL at Twitter, 26 weeks at Etsy, and 12 months at Netflix.

Employers consider several questions when designing a PPL or PFL program:

- Do benefits run concurrently with FMLA

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or other job-protected leaves?

- Is this for continuous leave only, or intermittent also?
- What are minimum time increments in hours, days or weeks?
- Is there an elimination waiting period before benefits begin?
- What job categories are eligible for benefits?
- Is there benefit parity for all genders and all leave purposes?
- Are there variable time-off caps based on the leave purpose?
- Are there variable time-off caps based on length of service?
- Is there coordination with other benefits to reduce cost, fill gaps, etc.?
- Is benefit administration internal, co-sourced or outsourced?

Employers that provide PFL see it as part of a flexible workplace that can produce several positive outcomes, according to the 2016 National Study of Employers by the Society for Human Resource Management. The study found that employees in more effective and flexible workplaces are more likely to have higher engagement, increased levels of job satisfaction, stronger intentions to remain with the employer, less negative and stressful spillover from job to home and vice versa, and better mental health.

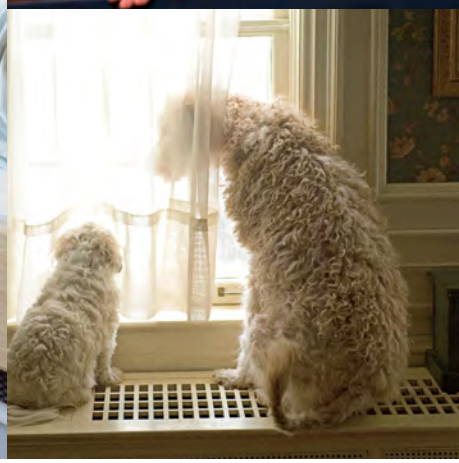
Rejecting Gender Restrictions

PFL advocates insist that it is not exclusively for new mothers or primary caregivers. Some employers are beginning to act on that, especially the PFL early adopters, according to suppliers and employers at the IBI Annual Forum in March.

"We recognize that caregiving is evolving alongside our economy and the nature and demographic composition of our workforce. Today, both men and women of all generations face challenges in meeting the demands of work and life," said Eileen Fernandes, Principal, Deloitte. "We believe gender- and generation-neutral caregiving support programs like Deloitte's positively impact the economy, worker productivity, and business."

In May 2016, Deloitte commissioned an online poll of employed adults in the U.S. with access to benefits, and found that 88% wanted a broader benefit for family care beyond parental leave. By September 2016 Deloitte expanded its own benefit, providing its eligible U.S. professionals up to 16 weeks of fully paid family leave to support life events — from the arrival of a new child, to caring for a spouse or domestic partner, to dealing with the deteriorating health of aging parents. Birth mothers may also pair this paid family leave with any short-term disability benefits for which they are eligible.

Deloitte's use of gender-inclusive language and a company culture that encourages both women and men to take parental and family care leaves address a key concern of PFL



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advocates. "When women are viewed as primary caregivers, this tends to hold them back in careers," said Vicki Shabo, VP of Workplace Policy Initiatives for the National Partnership for Women & Families. Children need to bond with both parents, she said, so a gender-neutral approach is good for families. Other gender-neutral language used in PFL programs and communications are "co-parent," or "secondary parent," or "non-birthing parent."

Yet even as broader PFL becomes more available, some employees — particularly men — are reluctant to use it. More than one-third of poll respondents in Deloitte's 2016 parental leave survey felt that taking parental leave would jeopardize their position, more than half (54% overall and 57% of men) felt it would be perceived as a lack of commitment to the job, and 41% felt they would lose opportunities on projects.

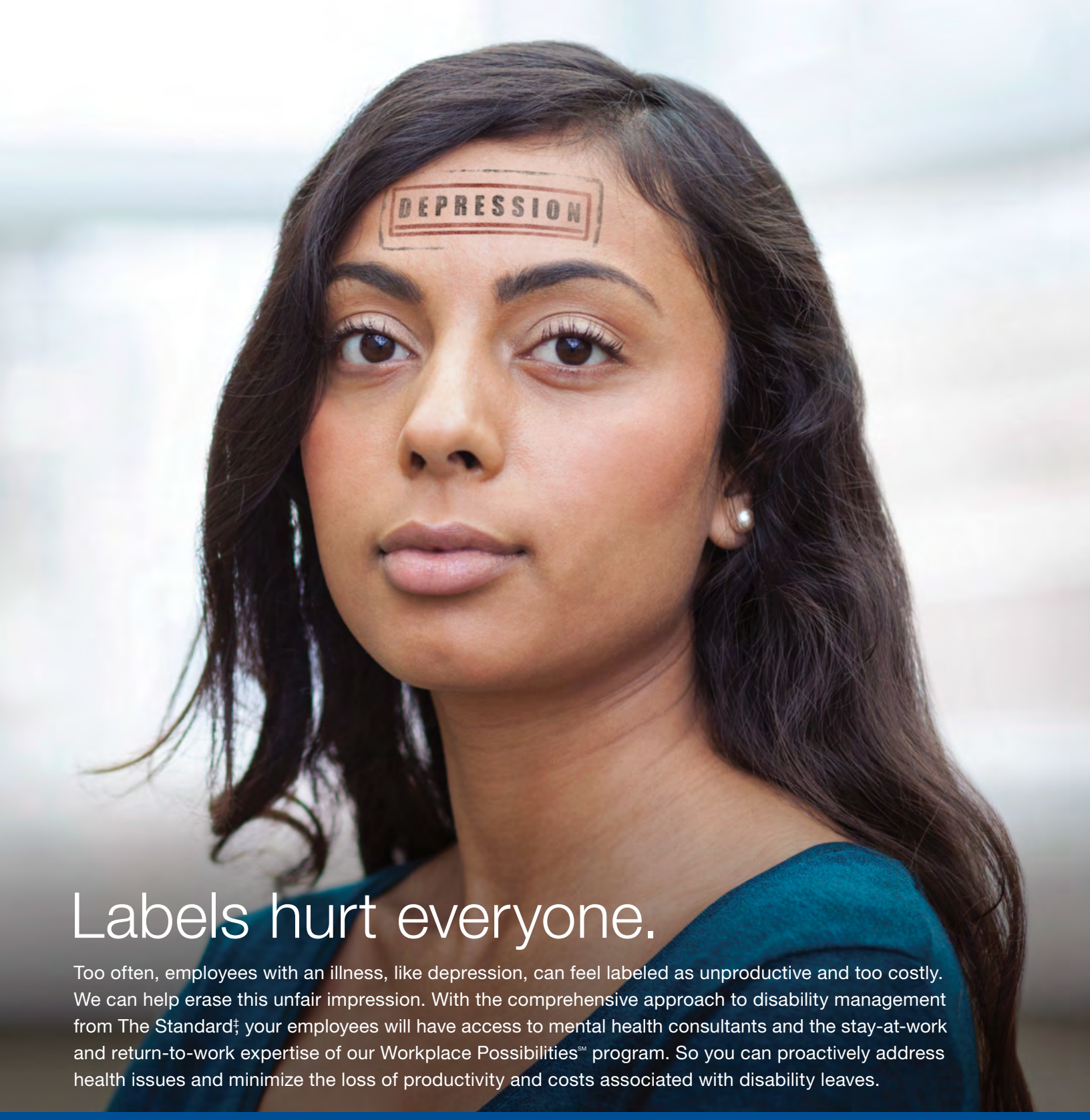
But despite a lingering stigma or the perception of a stigma around taking caregiving leave, broader PFL is popular with workers. Deloitte has found that its generous PFL program has created a positive buzz during the company's campus recruiting efforts and among current employees.

Another corporate leader in PFL benefits, Patagonia, identifies several paybacks from its position on PFL, said Shannon Ellis, Senior Director of Human Resources. "We received a 40% increase in online job applications after our CEO took a public position on the Family Act" (proposed federal legislation to create a national paid family and medical leave fund, paid for through shared employer-employee contributions), she said. Patagonia's employee turnover is "very low, even in retail and distribution centers that typically have high turnover," Ellis said, and Patagonia scores very highly across several measures of employee loyalty.

Small Employers and PFL

Among employers with 500 employees or more, 21% provide some form of PFL benefit to employees, compared to 13% of private sector employers overall, according to the Bureau of Labor Statistics. Smaller employers that provide specialized services and compete with larger employers — such as consultants and law firms — are much more likely to provide PFL.

Smaller employers are affected by the same employee family needs that drive PFL benefit decisions at major corporations. Half of all employees expect to provide eldercare in the next five years, and 43 million adults provided unpaid care to an adult or child in 2014, according to the Center for Work Life Law at the University of California, Hastings. While PFL covers many leave purposes, the California Employment Development Department in 2015 said that employees used California's PFL benefit for the following:



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• Parental well-child bonding represents 88% of leaves

• Family care represents 12% of leaves, including child caring for parents (one-third of this group), spouse caring for spouse (one-third), and parent caring for children (one-fourth).

For some smaller employers, laws in their primary state mandate PFL, making this a simple compliance decision. Although state or local paid sick leave laws are more prevalent, PFL laws are proliferating; PFL legislation for bonding and care is proposed in 18 states.

Especially among smaller organizations, not all employers can initially offer generous PFL benefits across all leave purposes. "It's like a toe in the water for some employers," said Heidi Pottgen, AVP National Absence Management Practice, Aon. "They can provide parental leave for bonding with a well child or eldercare to care for a sick parent, but not care for all sick family members." Because PFL has so many leave categories and benefit levels, it's possible to expand this benefit incrementally over time, which most employers have done, including corporations with best-in-class leave programs.

Many employers, large and small, are initially driven by state laws when they explore adding a PFL benefit. Levi Strauss & Co. was required by California law to provide up to six weeks of PFL for California employees at 55% of pay. San Francisco's new law requires employers there to top the benefit up to 100% of pay for six weeks in 2017, up to a maximum weekly cap of about $1,100.

"We began with how to comply with the laws, then looked at expanding this benefit to the whole country," said Mary Chavez, Global Compliance and Employee Relations Manager. They estimated the cost at various benefit levels with the help of a consultant, and decided to launch with a benefit of eight weeks for baby bonding. This is available to hourly, non-exempt employees in manufacturing, a position that rarely receives PFL benefits, making the Levi Strauss PFL program ground-breaking in its industry.

What to Do When

With a benefit program this complex, numerous challenges can arise.

Fernandes said company culture plays an important role in mitigating employees' concerns about taking PFL. "We realize not everyone has the same personal and professional priorities. So when starting new projects, for example, we invite staff to discuss 'how are we going to support flexibility and each other's unique needs?'" said Fernandes. "Putting that discussion on the table up front is an example of how an inclusive culture is closely tied to well-being."

It takes work to ensure that a PFL benefit provides a consistently positive employee experience. "One of the key obstacles to a successful leave of absence program is the challenge of implementing frequent and mandatory training programs to address the conscious or unconscious bias among managers about family leave and flexible work that can lead to discriminatory behavior," said Anna Steffeney, LeaveLogic CEO. In the 2016 DMEC Employer Leave Management Survey, manager training is one of the top leave management challenges.

Also, employees may be tempted to use the PFL benefit for inappropriate purposes. Levi Strauss' PFL program "is not a daycare alternative; it is to bond with your child," said Chavez. To support that goal, Levi Strauss approves a minimum two-week PFL increment, and needs a review to approve less than that. "We had to train employees on this; it took a while to get the message through that this benefit is not about personal convenience."

When a PFL benefit is announced, some employees will have a qualifying event that ends before the benefit is available to use. This can create frustration or resentment — the opposite of the program goal. An employer may announce a parental leave that will launch in six months and an employee complains, "but I just gave birth, let me use the benefit now!" To avoid ill will, Chavez said that employers should consider making the benefit retroactive

Paid Family Leave continued on page 36

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By
Tori Weeks, CWCP
Director of Workforce
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Integration Tool: Strategic Supplier Partnerships *Can Bridge Program Gaps*

When employers pursue integrated absence management (IAM), they often bring suppliers into strategic partnerships to achieve their ambitious goals.

The program model of using a single-source vendor for a turnkey integration program was rejected by the market about 20 years ago.

However, employers still want the advantages promised by that model, and have found that strategic partnerships can deliver some of those advantages. Suppliers who are sensitive to employer needs can bring more integration to difficult and fragmented program areas such as healthcare. And through strategic partnership tools such as vendor summits, employers can create a program environment where integration is facilitated among their suppliers.

"Employers recognize that the highest levels of integration demand long-term relationships with suppliers, including transparency and trust."

Supplier Relationship Management

Just as integration exists on a continuum, from rigid program silos to full integration using a data warehouse, supplier relationship management (SRM) also exists on a continuum.

At the base level of SRM, the employer coordinates between rigid program silos to reduce confusion for employees who have a leave or disability claim. At this level, cost savings are achieved by reducing the cost of services provided in each individual program silo. Suppliers may collaborate on handoffs between silos if the employer is not equipped to perform that function.

At the second level of SRM, the employer is beginning to manage the total cost of absences, not just the costs that occur inside silos. The employer may have a standard return-to-work (RTW) process for most absences, further improving the employee claim experience. In this level, suppliers are often asked to perform new services such as helping the employer iden-

tify and manage costs.

At the third level of SRM, the employer may have a working model of the total cost of absence and focus on key program performance metrics to reduce costs. The employer recruits supplier partners to help achieve several goals: reconfigure program silos, improve performance and data on key metrics, standardize data format, and improve employee handoffs between silos.

At the fourth level of SRM, suppliers are recruited as strategic partners to create a highly-customized program model and implement best practices such as:

- Shared databases/data warehouse
- Integrated systems
- Vendor cross-training
- Non-disclosure agreements
- Comprehensive employee medical authorization
- Cross-matching data points to measure effectiveness
- Streamline forms and processes
- Collaborative onsite analysis and strategic development

These practices often require a high level of supplier collaboration with the employer and between suppliers; a vendor summit can be an effective process to build this collaboration. At this level of supplier relationship management, many programs require highly proficient and innovative suppliers that are encouraged to propose program changes. Employers recognize that this level of integration demands long-term relationships with suppliers, including transparency and trust. Sophisticated integration environments require effective execution, which does not happen without the employer's willingness to invest in these types of services.

"While a summit may focus on vendor partnership and collaboration, it also creates opportunities to bring the organization's key internal players into the integration discussion."

Vendor Summit Objectives

A vendor summit provides opportunities to build collaboration between suppliers, and direct that shared focus to particular issues or goals. Unum has seen a significant increase by large employers to bring suppliers together, often at the employer's location for a full-day event. The basic agenda may be anywhere from an incremental improvement in an IAM program to implementing a new program model.

If the summit has an especially ambitious agenda, it is helpful for the project manager to have proposed the program model to corporate leadership and secured the high level of support needed for a bold initiative before planning the summit.

While a summit may focus on vendor partnership and collaboration, it also creates opportunities to bring the organization's key internal players into the integration discussion, with the goal of changing corporate culture and improving program alignment. Because vendor summits require planning, communication, and development, employers may want to consider securing a budget for a consultant.

Regardless of how ambitious the summit agenda is, here are some common goals for all summits:

- Identify services offered by each department to support employee well-being and benefits strategy.
- Optimize points of integration across departments and vendors.
- Develop processes and workflows for ongoing program improvement.

Vendor Summit Payoffs

Vendor summits operate on the basis of shared interest; this underlying good will is amplified by a well-planned

event. A well-organized and executed summit can produce many positive outcomes for an employer organization, such as:

- Improved employee experience during disability claims, leaves, or other absences, resulting from awareness of various resources and linking them to provide complete employee care
- Reducing duplicate requests to providers and employees through improved sharing of medical information
- Improved communication between program areas
- Streamlined absence management workflow and process
- A shift in corporate culture towards a consistent message and process
- Improved lost time outcomes, such as reduced incidence or reduced duration of absences
- Greater employee awareness of high value in the total benefit package
- Improved alignment of the organization's strategic goals
- Increased participation in an integrated health management approach by other key players inside the organization, or by improved vendor collaboration

Worksite Medical Integration

Vendor summits help firm up and expand the overall context of integration affecting all vendors. Healthcare, one of the most challenging areas of integration, merits a more focused initiative. One approach is worksite medical integration.

The fragmented, highly siloed nature of U.S. healthcare can create barriers to effective prevention, care, and management of health conditions. Injecting medical providers into the workplace, through an onsite clinic or periodic consulting visits, supports deeper interaction between employers and employees for the RTW process. These providers can rescue employees who might otherwise "fall through the cracks" in the healthcare system.

Frequently, such providers include physical or occupational therapists (PTs or OTs), and focus on musculoskeletal conditions. These providers have helped solve problems outside their specialty by making appropriate referral to other medical services available to employees, which requires additional education and training for the providers. Where employers offer onsite clinics, the provider roster may include physicians or nurses and the scope of care may be broader.

Knowing the precise physical requirements of essential job functions, PTs or OTs can design accurate plans for transitional RTW. Physicians working offsite usually know only what the employee tells them about job require-

ments, and often prescribe restrictions that are needlessly broad and counter-productive. By bringing musculoskeletal care onsite, employers and employees alike enjoy a better-informed and more holistic approach to recovery and return to work. When transitional RTW is planned carefully, graduated work assignments can be therapeutic.

Two case studies highlight how multiple vendors work together to solve RTW cases.

Case Study 1. An employee seriously injured in an automobile collision while off work needed a graduated RTW program, and was motivated to achieve a successful return to work. The treating PT in the health plan network had only limited knowledge of job tasks. The supplier, Briotix, provided a PT who met with the employee and the treating PT to reach agreement on a graduated RTW plan including therapy focused on the essential functions of the job. Briotix provided onsite job coaching to help the employee perform tasks safely and prevent re-injury. Briotix also collaborated to expedite payment of disability benefits which the employee needed to facilitate timely closure of the case with successful return to full duty.

Case Study 2. While delivering onsite injury prevention services, a Briotix provider met an employee whose spouse was starting chemotherapy for an advanced stage cancer. The treating provider indicated that treatment options were limited and the prognosis was poor. The Briotix provider knew about a medical second-opinion service available through the employer, and referred the employee to that program. The second opinion called for further testing, which indicated a need for change in treatment regimen — opening new options and hope for the employee and spouse.

Conclusion

Even in traditional, silo-dominated disability or absence management programs, coordination requires the cooperation of many parties including vendors. When employers embark on integration, they require vendor support in modifying silos, facilitating handoffs, and greater communication between silos. The more sophisticated the integration program, the more important strategic vendor partnerships become. Vendor summits have become a recognized best practice in taking integration to the next level of performance, and more focused efforts such as worksite medical integration can create better outcomes for employees, employers, and vendors.

Finding a Path Through the Collage of the Leave Universe

By
Dr. Michael Lacroix
Associate Medical Director
Aetna Disability

From the 30,000-foot view, the "leave universe" looks like a collage of employee entitlements that don't fit together neatly. Aetna found some new patterns in this collage that became the basis for an early intervention pilot program giving employees a large role in finding solutions for needs that result in leaves.

The entitlements collage has the long-established employer-funded benefits of short-term and long-term disability (STD and LTD) and the federal entitlements, including the military and Family and Medical Leave Act (FMLA). But then there are also leaves for a variety of other reasons that may exist in one state, one city, or one employer: leaves for civil air patrol, paternity, school visitations, "snow days," sabbaticals, etc.

While the collage may appear to be thrown together haphazardly, and with a nod to the human resources (HR) folks that may find it nightmarish to administer, one wonders whether the whole thing may not make more sense from the perspective of the end user, the employee who needs time off. Union members are renowned for their in-depth knowledge of union contracts, and consumers can be astute about using credit cards for different expenses. Is it possible that employees are savvy enough to find an optimal path for themselves through the maze?

For example, an intermittent FMLA leave requiring a fairly large paperwork effort for a relatively small gain — a few hours' leave in many cases — would make sense if an employee thinks the issue can be fixed pretty quickly. But an STD leave, providing a much longer leave duration and more money, would only make sense if the employee expects to be off work for some time.

Do most employees orchestrate their leaves on this kind of logic? If they do, we should be able to see evidence of progression from intermittent to continuous to STD leaves in cases where the rationale for the leave grows over time, but not so much for cases where the leave can easily be pegged in one category or the other from the outset.

We recently carried out an analysis of 17,000 FMLA requests from 2015. In about half of these cases, we cannot know the basis for the request since, by law, employees do not have to provide that information and indeed our experience is that about half of them do not. In 16% of intermittent leaves, a continuous leave follows next, and 13% ended as STD claims. For those FMLA leaves where a diagnosis was provided, mental health conditions (depression, anxiety, stress) were the most likely to move to continuous, and then into STD, with musculoskeletal conditions (MSK) claims predominating for those over 40. Medically more significant conditions such as cancers and immune disorders almost always bypassed the intermittent stage and moved straight into STD.

Among intermittent leaves taken for behavioral health and musculoskeletal conditions, about 14% became continuous leaves within 14 calendar days, one-third migrated between days 15 and 60, and the remaining half migrated after day 60. This suggests an "incubation period" with these leaves when employees try to deal with the problem on their own (and often succeed), but if they have not been successful after two or three weeks, they raise the ante.

We can easily imagine someone trying to deal with increased stress at home or at work by asking the doctor for anxiety medication. Someone may deal with a tendinitis condition by taking ibuprofen and giving the medication a few weeks to have an impact, but then calling for more structured time off if that doesn't work. After 60 days of this kind of do-it-yourself strategy, those who have not been coping successfully are generally ready to throw in the towel. This suggests that there may be a "sweet spot," roughly from 15 to 60 days after an intermittent leave request, when employers can intervene to prevent the development of a bigger problem. Note that this incubation period is not wasted: our data indicate that for those claims

that ultimately migrate to STD, the STD durations are shorter for both mental and MSK claims if preceded by an intermittent leave.

Intervening at the FMLA stage is potentially tricky because, as noted earlier, employees are entitled by law to those leaves. Offering assistance must be done very carefully. For example, in a pilot currently in progress with intermittent mental health leaves, we call employees to provide them with the information that we have resources that could assist them through their difficult time, and offer them access to these resources. But we never mention the words "Family Medical Leave" or "stay at work." Nor do we offer any incentive for participation. We only provide information about services which they may or may not wish to use. And we leave it up to them to contact the resources.

About one third of the folks decline any assistance. The large majority, about two-thirds of the employees who were contacted, we listed as "engaged" because they took the call and had questions. These people mostly benefited from help in understanding what services they are entitled to, and from a thumbnail education piece (what's the difference between psychologists, psychiatrists, clinical social workers, etc., and how to find the right specialist for you).

While this may not feel like much of an intervention, and it may feel a bit like walking on eggshells, the financial impact can be profound. After the telephone outreach in the pilot, we did not know the actions taken by the "engaged" members with approved leaves. But the majority who "engaged" spent seven fewer days on FML on average than those who declined any assistance. STD durations for those FML claims that did migrate were also much shorter on average (14 days) for members who did "engage." Note that these data from a pilot need to be confirmed in a larger sample, but they are tantalizing.

Consider that the average duration of an STD musculoskeletal claim is 75 days, and 76 days for a mental health claim (2015 Aetna internal data, unpublished). Consider further that the average daily wage for workers in 2015 was $184 and that the average daily benefit cost was a further $84 per day.[1] For most employers musculoskeletal claims amount to about a third of their STD claims and behav-ioral claims approximately 10%. Even a small dip in the proportion of claims that migrate from intermittent to continuous, and then to STD, will have a huge impact on the bottom line.

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Combatting Excessive FMLA Leave Using the Disability Interactive Process

By
Rachel Shaw, MBA
Principal
Shaw HR Consulting, Inc.

An unintended league of employees is growing under the cover of the Family and Medical Leave Act (FMLA) — permanent part-timers receiving the benefits of a full-time worker.

The FMLA was intended to bridge the gap between medical incapacity and a safe and full return to work for protected leave categories. The FMLA was never intended to protect the jobs of employees who are too disabled to ever return to work full time. And it was certainly never intended to protect those who use it to lengthen weekends or as an excuse for poor attendance.

The FMLA was created to provide leave that accommodates an employer's clear interest in maintaining a productive and financially sound operation, benefiting both employees and customers. However, an unreasonable number of unscheduled absences due to FMLA leave can disrupt productivity, sometimes with catastrophic effects.

How can organizations accommodate employees with serious medical conditions and legitimate work limitations, while keeping FMLA abusers at bay? In addition to second and third opinions and recertification, one of the most effective and efficient tools is the disability interactive process.

Many employers see the FMLA process as separate from the Americans with Disabilities (ADA) interactive process. It isn't. The two laws have so much overlap that the FMLA is always encountered when moving through the ADA interactive process. The FMLA tells employers that, for qualifying employees, FMLA leave periods of 60 days over 12 months are reasonable. The FMLA does not allow for a more robust discussion about alternatives to leave. The ADA does, however, allow discussions to explore whether additional reasonable accommodations exist that may support the employee to miss less work. If an employee takes leave year after year, then likely the FMLA is not enough.

When an employee takes leave, he or she triggers an organization to engage in a timely, good faith, interactive process that I describe as a hallway with four doors. At the end of the hallway, the parties arrive at a justifiable decision and best possible outcome for an employee who may or may not need workplace accommodations. Each door serves as a step along the path of ADA compliance:

- Door #1: Obtaining medical documentation
- Door #2: Exploration of accommodation ideas
- Door #3: Scheduling and holding a reasonable accommodations meeting
- Door #4: Closing the process properly

The hallway provides a framework for additional information to be collected, and conversations to be held. The goal is to identify accommodations that might better meet the employee's needs without incurring FMLA leave. This could include implementation of alternative accommodations that result in improved attendance, a reduction of unnecessary leave, smarter scheduling of medical appointments, or simply the opportunity to talk with an employee about how best to manage the leave needed. For some employees, having a focused discussion alone may support a reduction in leave taken. In many disability cases, the hallway process provides a safe environment for difficult conversations and reveals the willingness of both parties to brainstorm solutions.

Win/Win FMLA Case Study

A woman named Sally took FMLA leave every Thursday and Friday. At Door #1, through a medical questionnaire sent to her provider, the employer learned she had a treatment every Wednesday evening and needed two days to recover. The employer did not believe a recertification or second opinion was needed, but decided to meet with the employee to better understand if the leave was appropriate or a misuse.

At Door #2 — exploration of accommodation ideas — a series of conversations were initiated. The employer shared Sally's leave was difficult for the organization to staff around. Was there a way to reduce her overall leave time by getting treatment on Thursday or Friday so she would miss one day, and not two? The employer explained they supported her leave needs, and wanted her to prioritize her medical treatment over work, but also wanted to discuss possible options. Sally explained she scheduled the appointment on Wednesday because that was when her son could drive her home. After talking with the employer about ways to minimize the impact on her employer and her pay, Sally shared she may be able to ask a friend or family member for help with transportation on another day.

At Door #3 — in an accommodations meeting where ideas were discussed — Sally changed her appointment to Thursday evening. In addition, the employer was able to temporarily accommodate her to work four, 10-hour shifts. As a result, the employer's challenges accommodating around the leave were reduced and her leave usage dropped by 50%, all while increasing her take-home pay.

At Door #4, the plan was finalized and implemented with both parties clearly understanding Sally's leave needs.

While Sally's case had a happy ending for both parties, this can be an emotional and tough process. It can end in medical separation of an employee who is too disabled to work full-time — but if these situations are not properly addressed, continued significant leaves will impact operations and lower morale.

Handling Abuse or Misuse Leave Cases

When addressing concerns about employee misuse of FMLA leave, consider requesting a recertification under FMLA, or getting a second opinion at Door #1. When an employee's leave has been approved, but there is a concern over the use of FMLA, or when leave is inconsistent with the request, request a recertification.[1] Requests for recertification can typically be performed every 30 days.[2]

Second and third opinions are also excellent tools to use when an organization has a "reason to doubt the validity of a medical certification." Be prepared to communicate verbally and in writing the specific concern. These must be based on explicit observations or comments that raise objective doubts about the validity or accuracy of the certification.

If a second opinion is required, the employee needs to be provided with provisional FMLA benefits until the second, and potentially third opinion, are completed. Employers will need to select a second opinion doctor not regularly used by the employer. The employer bears the cost for the exam and if the second opinion conflicts with the employee's FMLA certification, then a third opinion is required unless the employee agrees with the second opinion. In the case of a third opinion exam, the results become final and binding for all parties.

Conclusion

Though an employee has FMLA leave rights, this does not mean an organization can't open the interactive hallway process concurrently. An organization can often better speak to concerns and reduce unnecessary leave usage through this process. This is true whether there are negative impacts on the organization for legitimate leave, or when there are concerns of leave abuse.

The goal when starting the process is to better support the employee and the organization. It is not to interfere, restrain, or deny legitimate FMLA leaves. Conduct the process with the same tone and focus as when addressing work restrictions. Be open, be supportive, and seek better accommodation solutions, if possible. If the organization has concerns over the validity of the FMLA usage, be candid and honest, but don't accuse. Many employers find opening amicable conversations about leave — before frustration occurs — can improve attendance and reduce the negative impacts of leave.

References

1. California employers cannot request a recertification every 30 days, but must wait until the FMLA certification period ends.

2. Recertification can be requested earlier than 30 days if: a) the employee requests an extension of leave, b) circumstances of the certification change significantly, or c) the employer receives information that casts doubt on the reason for leave. California employers do not have this option.

Going "Above & Beyond": Exceeding ADA Requirements Without Getting Burned

By
Francis Alvarez, JD
Principal, National Coordinator of Disability, Leave & Health Management Practice
Jackson Lewis PC

Despite Americans with Disabilities Act (ADA) litigation horror stories, some employers surpass ADA requirements and provide extra support to employees without suffering legal penalties. To achieve this, however, requires advanced accommodation program design and protocols.

Some professionals ask, "but why would I want to surpass ADA requirements?" It may be best to answer this question with another question: Why would you want skilled, experienced employees to leave your organization?

We need to stop thinking of the ADA as a problem to be mitigated and start seeing it as an opportunity. Many employers have made that shift in regard to workers' compensation (WC) claims. WC costs can be so significant that some organizations adopt an "above and beyond" attitude toward helping WC claimants stay at work (SAW) or return to work (RTW).

Many of our clients have begun to apply this approach toward the ADA. This is a natural extension, since many WC claimants also qualify for ADA protections. Providing intensive intervention and supports for WC claimants has been shown to reduce absence duration, and has become a recognized best practice.

Applying this same "above and beyond" approach can help reduce absence duration for ADA cases as well. Effective ADA accommodation programs also have been shown to increase employee retention.[1] They may also reduce ADA litigation risks by solving difficult cases, increasing employee satisfaction and loyalty, and demonstrating the company's good-faith efforts to comply with law. An effective ADA program that applies an "above and beyond" approach to help employees succeed has substantial payoffs for both employer and employee.

And contrary to popular belief, case law shows that employers can select some cases for accommodations that exceed ADA requirements without locking in an unsustainable precedent. Appeals courts in several circuits have not penalized employers that operated in the spirit of the ADA to help employees succeed on the job. These cases reduce the twin fears of establishing a precedent that sets the bar too high, or of being penalized for being "inconsistent."

Employers can escape the "no good deed goes unpunished" scenario by meeting three important "above and beyond" requirements:

- Acquire a better understanding of the law.
- Acquire a better understanding of the jobs in your organization.
- Develop a better system of reasonable accommodation.

What Is a "Reasonable Accommodation"?

Despite what you may have heard, the ADA and its associated case law have established that none of the following items are required elements in your next reasonable accommodation:

- Removing essential job functions
- Diluting uniformly enforced productivity standards
- Excusing or forgiving past misconduct or poor performance
- Promoting employees
- Bumping another employee from an existing position
- Creating a position
- Changing a supervisor (as compared to changing supervisory techniques)
- Providing items of a personal nature (e.g., hearing aids, eyeglasses, wheelchairs, or prosthetic devices that are used both on and off the job)

This list of rejected requirements helps restore the "reasonable" aspect of accommodations! But do not be surprised if employees or their medical providers request these accommodations. By acquiring a better understanding of the law, your managers and your organization have much more flexibility to reject inappropriate requests that are outside the law.

Understand Your Jobs

Good line managers know the job functions of their staff in great detail. Many organizations assume that is all they need to defend in court if litigation occurs. But do line managers want to be in the position of "your word versus the employee" in court? In an unpredictable jury trial, this could be a high-risk position. It is a far stronger position if an organization has job documentation including:

- The position's essential job functions
- A documented job analysis to validate the manager's judgment concerning the position's essential job functions
- The position's qualification and productivity standards
- A written job description documenting all of this

"Above and Beyond" ADA Cases

Granting more leave than necessary. Over three years, Ford Motor Company automobile assembler Thomas Amadio was granted 23 leaves requiring more than 70 weeks off work for multiple issues. Amadio allegedly failed to comply with Ford's short-term disability program; he was terminated, and sued Ford for discrimination.

The district court dismissed the case, and the U.S. Appeals Court for the Seventh Circuit upheld the dismissal. In *Amadio v. Ford Motor Co.*, the court stated that if an employer "bends over backwards to accommodate a disabled worker ... it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation."

Creating positions. William Lucas suffered a work-related injury and employer W.W. Grainger accommodated him by temporarily displacing two office workers to allow him to perform their duties. Lucas then requested reassignment to another position despite the absence of any vacancies. Because his request was denied, Lucas sued for retaliation under the ADA.

The district court granted summary judgment in favor of the employer. When affirming the lower court ruling, the U.S. Appeals Court for the Eleventh Circuit stated, "Good deeds ought not to be punished, and an employer who goes beyond the demands of the law to help a disabled employee incurs no obligation to continue to do so."

Eliminating essential job functions. *Lucas v. W.W. Grainger, Inc.* cited above also established that eliminating essential job functions is not required. The Eleventh Circuit court stated, "Employers are not required to transform the position into another one by eliminating functions that are essential to the nature of the job as it exists."

Other key precedents for employers. Clear legal precedents establish several other important limits on the ADA. Employers are not required to provide accommodations that would:

- Continue eliminating essential job functions, see *Holbrook v. City of Alpharetta* (Eleventh Circuit)
- Excuse a rotating shift requirement, see *Laurin v. The Providence Hospital* (First Circuit)
- Permit a part-time work schedule, see *Terrell v. US Air* (Eleventh Circuit)
- Allow work from home, see *Smith v. Ameritech* (Sixth Circuit)
- Provide multiple leaves for substance abuse treatment, see *Evans v. Federal Express* (Eleventh Circuit)

"Above and Beyond" Protocols

At the heart of many lawsuits are unreasonable employee expectations about what constitutes a "reasonable" accommodation. When going above and beyond ADA requirements to accommodate an employee, the employer must communicate clearly to avoid inflated expectations. To avoid this problem:

- Set the stage by clarifying essential job functions in the job description.

Compliance Makeover continued on page 37

Marti Cardi, JD
VP Product Compliance
Matrix Absence Management

Is "No Overtime" an ADA Reasonable Accommodation?

Unlike the Family and Medical Leave Act, the Americans with Disabilities Act (ADA) provides employers with some options and defenses in addressing a no-overtime restriction as an accommodation. Considerations include reasonableness, whether under the reduced work schedule the employee is still able to perform the essential functions of the position (is it "effective"), and, if necessary, undue hardship on the employer.

Reduced hours as a reasonable accommodation. A reduced schedule is, in general, a reasonable accommodation under the ADA. Waiving overtime is a form of reduced schedule. According to the Equal Employment Opportunity Commission (EEOC), an employer must provide a modified or part-time schedule as a reasonable accommodation (absent undue hardship) even if it does not provide such schedules for other employees. On the other hand, a reasonable accommodation must still enable a qualified individual with a disability to perform the essential functions of the position.[1]

Essential functions. An employer does not have to eliminate an essential function as part of or as a result of an ADA accommodation. Nor is an employer required to lower work quality or quantity standards for the position. However, an employer may have to provide a reasonable accommodation to enable an employee with a disability to meet the standards.[1] For example, in order to enable an employee with reduced hours to maintain production standards, the employer might need to eliminate or shift some of the employee's marginal functions as an additional accommodation. The next article in this series will address how overtime itself may be an essential function of a job.

Is excusing the employee from mandatory overtime an undue hardship? "Undue hardship" means significant difficulty or expense and refers not only to financial difficulty, but to reasonable accommodations that are "unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business."[1]

Because cost of an accommodation will rarely establish an undue hardship for an employer — especially a large one — the focus should be on factors such as:

- Whether other workers are available to pick up the extra work due to the employee's no-overtime restriction (consider the number of employees at the facility, in the particular or similar positions, and with the necessary skills and qualifications)
- Employer policies, staffing practices, and needs regarding work hours and overtime
- The effect of the employee's time off on business operations, workflow, production, etc.
- The effect of the employee's time off on other employees who will pick up the work missed due to the no-overtime restriction (morale alone is not enough):
  - Are there excessive demands on other employees' time or efforts?
  - Are other employees unable to complete their own work?
  - Does the employee's no-overtime restriction place any other substantial burdens on co-workers?
  - If cost is a big factor, look at the resources of the particular business facility or unit, and overall company resources.

Cumulative effect of multiple no-overtime employees. Can the employer consider the cumulative effect of granting no overtime as an ADA accommodation, when several other employees then request the same accommodation? No and yes. First, the employer must perform an individualized assessment with respect to each employee and consider undue hardship factors based on the current state of affairs. If just one more request ultimately creates an undue hardship, be ready to explain the operational or financial hardship experienced in denying the latest request.

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Shawn Austin, MBA
SVP Distribution
Liberty Mutual Benefits

Early RTW: An Important Tool in Containing Total Employer Medical Spend

Early return to work (RTW) is a valuable cost-control approach that can be more effective than other strategies, such as wellness programs, cost sharing, and cost constraints.

By helping workers return to work as soon as appropriate — regardless of the type of claim — an employer often saves medical, indemnity, and indirect costs such as temporary employees and overtime.

Healthcare premiums are growing at an estimated annual rate of 6.5%, and will likely continue to outpace general inflation.

Healthcare premiums are the largest benefit expense at 8.3% of employer compensation costs, according to the U.S. Bureau of Labor Statistics (Dec. 2016).

Employers have developed a range of responses to this challenge. Two of the most popular are:

- *Wellness Programs*: 76% of employers offer one, yet there is little evidence that they significantly lower total healthcare costs.[1]
- *Cost Sharing/Cost Constraint*: Employees are paying a greater share of their healthcare premiums, prescriptions, deductibles, and out-of-pocket costs. This approach reduces employer costs but may also reduce access to appropriate treatment.

Quickly and appropriately returning employees to work can more effectively lower overall medical costs for many common health conditions. Employers implementing an early RTW program for lower back injuries reduced associated medical costs 40% to 70% through early workplace communication and problem-solving.[2]

In addition, combining early case management with early RTW programs improved average claim metrics in a group of Australian employers:[3]

- Indemnity costs reduced by 35%
- Durations reduced by 58%
- Medical costs reduced by 30%

Early RTW Best Practices

Four best practices facilitate early RTW.

Make reasonable accommodations and modifications to help injured employees stay at work (SAW) or return to work. Common solutions include addressing issues with sitting, standing, lifting, and breaks. Often it is helpful to provide alternative work and light duty for injured employees. Injured employees meet with supervisors in an interactive process to plan accommodations.

Engage partners. An employer should involve its health and disability insurers, third-party administrator, and other key partners in its SAW and RTW programs. This can range from educating these partners about the programs to actively involving them as appropriate to support SAW and RTW efforts with individual employees, as allowed under law.

Integrate across your organization. Clear and consistent policies must apply throughout an organization. Develop and continually highlight a formal early RTW program that includes SAW initiatives. Remind supervisors that open, engaging, appropriate communication may result in direct reports taking fewer absences and being away from work for shorter durations. Support their communication about ability to work — staying clear of specific diagnoses or treatment issues.

Consider coordinated absence management. Integrated absence management (IAM) can help employers gain the full benefits of early RTW. While IAM is tailored to each employer, it generally coordinates workers' compensation, disability, absence, and other leave programs with early RTW and associated health and wellness efforts.

Early RTW programs help employers better manage total medical costs, while attracting and retaining employees in an increasingly tight labor market, and helping employees return to productive lives following serious injuries.

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COLUMN

Employee
Financial Fitness

Phil Bruen
VP Group Life and Disability Products
MetLife

Paid Family Leave: The Changing Landscape

About one in four Americans have taken leave to care for a relative with a serious health condition.[1] Additionally, 25% of employees anticipate having to take a leave in the future for the same reason.[1] While the Family and Medical and Leave Act of 1993 guarantees workers up to 12 weeks of unpaid leave per year without the threat of losing their job, the United States is the only developed nation that doesn't mandate paid family leave.

In 2016, only 13% of civilian workers had access to paid family leave (PFL),[2] leaving 87% of workers without income while caring for a loved one or bonding with a newborn child.

The Current State of PFL

Three states today require PFL: California, New Jersey, and Rhode Island. New Jersey offers both state-sponsored and privately insured options for employers while California offers a state or a private self-insured option. Rhode Island administers its program with no private insurance option.

The remaining states have major gaps in protection. The Family Act of 2015 was re-introduced in February 2017 as the Family and Medical Insurance Leave Act to create a comprehensive, national program to help meet the needs of employees requiring time away from work, while helping make it affordable for employers of all sizes to offer PFL. If this bill is passed into law with the funding needed to implement it, many employers will be affected.

On the Forefront of Change

Several states have already passed or proposed their own laws. New York has made it mandatory to offer PFL by coupling it with the NY State Disability Benefit Law beginning Jan. 1, 2018. The law starts with eight weeks of PFL in 2018 and increases to 12 weeks of PFL for covered employees by 2021.

The NY Department of Financial Services released its final PFL regulations on May 30, 2017, and the NY Workers' Compensation Board was expected to publish final regulations in June or July, 2017. Over the next few years, we anticipate increased legislative and rule making activity as more states and municipalities look to add PFL programs.

Creating Opportunities

Many employers have already added or expanded their PFL benefits, and Forbes predicts this trend will continue since several large companies added or enriched their paid leave policies in 2016.[3] Employers view paid leave programs as an opportunity to attract and retain high caliber employees and maximize productivity among their existing employee workforce. Employers will need to continue to understand how their corporate paid leave programs integrate with these state and municipal paid leave programs being implemented.

Adults who are employed or looking for work value flexibility.[4] Among those who have taken leave in the past two years or have considered it, having paid leave for family or medical reasons is cited as being the most helpful, more than any other benefit or work arrangement.[4]

The Future

Paid family leave programs are still a fairly new concept in the United States. As states develop their own requirements or a federal PFL law is passed, employers will have to adapt. Employers may want to consider working with an insurer or vendor that has the right family leave solutions to meet a variety of needs — and the experts to help them navigate the evolving regulatory environment.

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Ask the Accommodation Experts

Jenny Haykin, MA
Intgd. Leaves & Accommodations
Puget Sound Energy

Tom Sproger, MS
Ergonomics Consultant
Solutions Northwest Inc.

Managing Leaves When Employees Have Unpredictable Health Conditions

A disability and leave of absence manager at a hospital system submitted the following question related to reasonable accommodations.

I recently received an accommodation request from a nurse requesting an exception to our two-hour call-in requirement. The employee and her physician said that it is not always possible for her to know two hours in advance when an episode will render her unable to work. She may already be on her way to work and need to turn around and go home. She is not eligible for the Family and Medical Leave Act as she doesn't meet the hours worked requirement and has exhausted her state leave. How should I evaluate and respond to this type of request?

Accommodation experts Jenny Haykin and Tom Sproger discuss how to approach unpredictable absences.

Managers struggle for solutions after last-moment absence requests by employees. Nonetheless, some health conditions do flare up unpredictably. Common causes for unpredictable absence patterns are migraines, irritable bowel syndrome, and anxiety attacks.

When an employee has a condition that causes unpredictable absenteeism, it is helpful to obtain estimated frequency and duration information from the healthcare provider. An employee who is likely to miss a few hours every few months on a temporary basis will be more easily accommodated than the employee who is out for days each week on an on-going basis. With this information, you can then assess what the impacts of the absences will be.

Given the employee's role as a nurse, reducing the level of patient care and potentially putting patients at risk due to being short-staffed is not reasonable. Instead, if temporary nurses or floaters are available on short enough notice to cover the missed shifts, accommodating the absences may be reasonable. If staffing resources are not sufficient to address the frequency of absenteeism and/or the short notice, it is advisable to document the impacts on the staff and the impacts on patient care as well as gathering the job description, expectations, and requirements.

With this impact assessment in hand, you can explain to the employee why punctuality and attendance are essential to the position, making the case that she or he is not qualified for the position.

It is common for employees faced with the prospect of losing their job to respond that they may be able to have their restrictions changed. If this occurs, advise them that any revised restrictions information must be accompanied by an explanation from the healthcare provider of why the previous restrictions are no longer valid and provide a strict deadline by which any additional medical documentation will be considered.

If restrictions cannot be accommodated in the employee's present role, the next step in the accommodation process is to seek reassignment to a vacant, non-promotional position that can allow more flexibility of work hours. Reassignment is indicated in the ADAAA as a type of reasonable accommodation. In case law, it has been determined that employers have an obligation to reassign an individual to a non-promotional position that the individual is qualified to perform, if such a position is vacant. The Equal Employment Opportunity Commission (EEOC) states, "an employer must place the employee in a vacant position for which he is qualified, without requiring the employee to compete with other applicants for open positions" (EEOC Guidance "Employer-Provided Leave and the ADA" May 9, 2016). There may be no vacant positions that can reasonably accommodate an unpredictable attendance schedule, but it is advisable to make a good faith effort to search before reaching that conclusion.

Bryon Bass
SVP, Disability and Absence Practice & Compliance
Sedgwick

Health Assistants Support Integrated Benefits

Integrated benefits programs have long captured the imagination of employers. Some of the more progressive organizations have implemented some form of integrated solution in recent years but still come across traditional barriers to fully integrated programs in the form of incompatible technology platforms, political turf wars, or organizational resistance to change. However, the introduction of a health assistant as a conduit for many benefit plans and resources is expected to make long-awaited in-roads to program integration. It is believed a single resource for all questions related to medical treatment, workers' compensation, and disability and leave concerns can deliver much needed simplicity in what have become highly complex and specialized areas.

A health assistant would serve as a single resource or concierge for employees for all benefits-related questions and needs. This would hold true for both occupational and non-occupational injuries and illnesses. This individual would also help employees navigate the maze of issues and concerns associated with time off work for any reason whether due to family medical leave, intermittent absences, or pregnancy-related matters. Because so many benefits are dependent upon one another, but not necessarily integrated, a designated health assistant would help eliminate the need for an employee to go to multiple resources to get their questions answered.

An employee's health concerns, as well as the medical needs of family members, can impact productivity. Having a knowledgeable and trained medical assistant who can guide employees through the entire process for themselves and all family members can save time and improve employee satisfaction.

Employing this approach, a health assistant would function in a virtual world staffed with highly trained resources and specialists including medical doctors, behavioral specialists, pharmacists, rehabilitation experts, nutritionists, and many other clinical resources. Under this model, all team members can access necessary data, and services become integrated. This begins with capability to receive an electronic and verbal authorization to release medical information from the employee being served, a paperless process that moves services forward instantly.

Each health assistant ensures employees get the information they need and connects them with experts who can assist with a wide range of topics in specific areas such as mental health, chronic disease, or pregnancy. The health assistant will help the person with the topic about which they are calling and then look beyond the initial question to see if there are other areas where they can be of assistance. For example, a woman calling about her deductible may express concern about high blood pressure. The assistant will look into her question about the deductible and then mention that there is a clinical specialist on the team who is available to help with additional questions if needed.

This type of program is among the first to link health plans, workers' compensation, disability and leave, and job accommodation offerings together. Data integration allows the team to provide proactive assistance to the employee. It also offers an opportunity to streamline enrollment and pay reimbursements through a holistic health and productivity approach.

A positive patient experience offers advantages to all parties. The health assistant ensures the employee receives the information for which he or she is calling about and helps from start to finish — no matter what the specified needs are. This new model is designed to streamline the process, reduce additional calls, and ultimately, save time.

Early adopters offering health assistants have consistently demonstrated healthcare spending reductions and improved employee satisfaction. With the integration of health and productivity solutions, not only is a reduction in healthcare spending expected, but a positive impact on days away from work and claim durations is also anticipated.

Matthew Bahl, JD
Dir. Health & Productivity Analytics
Prudential Group Insurance

Kristin Tugman, PhD
VP Health & Productivity Analytics
Prudential Group Insurance

Best Practice #3: To Align or Not to Align Workers' Comp and Disability RTW

It is no secret that employers with return-to-work (RTW) programs tend to experience shorter claim durations and lower disability related costs.

As employers continue to explore and implement RTW programs they often wrestle with a key question: should they apply the same RTW rules for their workers' compensation (WC) and disability programs? This question has gained importance as the Equal Employment Opportunity Commission (EEOC) advocated in recent years what appears to be a "parity" position: an employer that offers an RTW program for WC cannot exclude non-occupational (non-occ) claims.

A recent study from the Integrated Benefits Institute found that employers that manage non-occ and WC claims in the same department and apply the same RTW rules to both types of claims have shorter durations than those that do not.[1] This study, however, focused primarily on the durations impact of aligning a company's non-occ and WC programs. Before making the decision to align the two programs, employers should consider issues related to compliance and health and productivity.

Compliance: Light Duty, WC, ADA, and the EEOC. Many employers have historically offered light duty only for WC claims. In recent years, the EEOC has taken the controversial position that this restriction discriminates against individuals with disabilities.[2] Some legal experts disagree with this position. While recognizing that temporarily removing essential job functions could be a reasonable accommodation under the Americans with Disabilities Act (ADA), they claim that this is different than light duty.[3] In short, the EEOC's position is not established law and employers may have legitimate reasons for treating WC and non-occ claims differently. Nevertheless, if employers reserve light duty exclusively for WC injuries, they might have to defend against the EEOC's parity position.

RTW Rules: Light Duty or Productive Work. If employers align their WC and non-occ RTW rules, a key decision centers on whether they apply light duty across the board or only when productive lighter work is available. Applying a uniform light duty standard may help decrease overall durations, but it also might increase the volume of non-productive work being performed. This increase could add strain and cost to business operations in the form of overtime, temporary workers, and burnout for workers who remain to perform productive work.

Another issue for RTW rules is that employers often try to eliminate WC lost time by requiring employees to return to light duty work immediately upon medical evaluation. This practice is usually unavailable for someone with a non-occ disability as an individual cannot be required (but may be incented through the benefit structure) to return when work capacity is not present. Conversely, transitional RTW that focuses on productive work can also result in shorter non-occ disability durations but may result in longer durations on the WC side, which can result in increased cost for an employer's program.

The bottom line is that RTW programs for WC and non-occ circumstances work, but the devil is in the details about productivity standards for light duty work. As employers take advantage of RTW programs there are a host of considerations to think through to ensure the design and implementation of the most effective program possible.

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Les Kertay, PhD, ABPP, LP
Senior Medical Consultant
R3 Continuum

Behavioral Factors in Integrated Absence Management

It isn't a question of whether behavioral factors matter in integrated absence management (IAM). Instead, it's a question of whether we address them deliberately, or whether behavioral factors sabotage and undermine our best efforts. Here are three principles essential to understanding how to address behavioral factors in IAM.

Principle 1: Precision Matters

Because stress is ubiquitous in the workplace, stress management is a set of skills that benefits everyone in the workplace. But stress may or may not lead to psychological symptoms such as anxiety or impaired concentration; not every stress case requires IAM. When a person experiences significant symptoms, stress management alone usually won't maintain function; it might be necessary to consider job adjustments or accommodations, but mental health treatment may not be necessary. This is the frontier where a case may graduate from stress management to IAM.

Not all psychological symptoms are severe enough to warrant a psychiatric diagnosis, and when one is assigned, it should be done according to a standard protocol. This is an important point in managing behavioral health claims for disability or worker's compensation benefits: no claim should be adjudicated absent a clear diagnosis that follows a clear protocol that includes a careful history and/or psychological testing. Finally, not all psychiatric diagnoses translate to work-related disability. As with diagnosis, a standardized approach to functional assessment is a critical component of the IAM program.

Principle 2: Earlier Is Better

Early identification of behavioral factors and the way they impact workplace productivity is a key to successfully managing workplace absences. Managing stress is easier than modifying work duties to accommodate a symptom, and modified work costs less than adjudicating a claim. We haven't clearly demonstrated across the board that early intervention will always prevent claims. Nevertheless, it's a reasonable practice that can be used to address behavioral factors across the spectrum of a comprehensive IAM program. When possible, address stress first, then accommodate work to help manage symptoms. Build your program around taking these steps first, and managing a behavioral claim will be the last resort.

Principle 3: Focus on Function

In IAM programs, function matters more than diagnosis, and functional restoration matters more than clinical treatment. The different perspectives can create an apparent conflict between the functional goals of the IAM program and the clinical goals of a treating provider, with the employee/patient caught in between.

From a clinical perspective, the goal is to cure any underlying condition and, when possible, to relieve symptoms. From an absence management perspective, the goal is to return the employee to work. These aren't inherently different positions, and it's quite clear that the best clinical outcomes occur for those individuals who stay at work or return to work.

Often, however, and particularly when it comes to behavioral conditions and symptoms, clinicians may argue that an employee who is anxious at work should remain off work until the anxiety is resolved. Similarly, managers may worry that an anxious employee will be unable to function at full capacity, and therefore should remain off work. In practice, however, anxiety about being at work increases as the individual is off work longer, and the cycle is counterproductive. Once the employee has stabilized, work is almost always beneficial, physically and mentally. If the real issue for the employee is an unhealthy relationship with the supervisor, the employer can intervene to help, but time off work by itself will not solve the problem.

We have long made work a critical component of IAM programs, and mental health is a key to productivity. Educating employees, managers, and providers about this will help the system work for everyone.

Anna Steffeney
CEO
LeaveLogic

Kirsten Gillibrand, JD
U.S. Senator
D-N.Y.

The Future of the Family Act: An Interview with Senator Kirsten Gillibrand

Feb. 5, 2017 marked the 24th anniversary of the groundbreaking federal Family and Medical Leave Act (FMLA). Shortly thereafter, the Family Act, legislation to create a self-sustaining family insurance program for all American workers, was reintroduced to Congress by Senators Kirsten Gillibrand (D-N.Y.) and Rosa DeLauro (D-Conn). During a recent group interview with Sen. Gillibrand, she discussed the future of the Family Act. The statements of Senator Gillibrand in advocating for legislation do not necessarily reflect the opinion of DMEC or its members.

Question: What is the value of a federal program as opposed to state-run programs?

Sen. Gillibrand: Not all states have a large enough population to afford a state-run paid leave plan. The smaller states that support a paid leave bill, North Dakota for example, would never have a risk pool large enough, like California and New York, to afford a state-wide plan. They need a national plan where the risk pool is the whole country so that the buy-in for this insurance is low. Currently, the buy-in to have a paid leave plan for up to three months off at 66% pay is $2.00 a week per employee. Employers and employees will contribute to the fund which would be used to pay the employee's salary while on leave. This approach makes a paid leave possible for small businesses that otherwise couldn't afford it.

Question: What is the opposition to the Family Act?

Sen. Gillibrand: The primary opposition is against any additional tax. However, the Family Act is built exactly like the Social Security Act — an earned benefit, an investment in yourself to be used when you need it. Other groups are concerned about deviating potential funds that could otherwise be invested in the Social Security fund. This argument does not take into consideration the fact that the constituency benefiting from Social Security, the Baby Boomers, will also benefit from the Family Act through the funds supporting family members to care for them. Most people are part of families, and they want to be there for their family member when they need it.

Question: What is the likelihood of the bill passing?

Sen. Gillibrand: When we started this effort three years ago, we wanted to get the conversation onto the presidential slate. We did. Two Republican candidates proposed a paid leave plan, both President Trump and Sen. Marco Rubio. While President Trump's plan only covers birth mothers, he has discussed openly the need for a national paid leave policy. My position is that any national policy must be gender-neutral. A women-only policy continues to marginalize women as the only caregivers in the company. Paid leave should be about family, not about women.

Among the American public, 70% believe paid leave is smart and makes good business sense.[1] We are trying to create a bipartisan movement, and we think the best way to make that happen is to continue the momentum toward a national narrative and call to action for federal legislation.

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COLUMN

Piecing Together the Integration Puzzle

Jeffrey Swaney
VP
WorkPartners

Linda Croushore, MEd
Sr. Director, Disability Services
WorkPartners

The Bermuda Triangle of HR Law

Some employee absence events may trigger not just one law, but the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and state workers' compensation laws. Violations of these laws may cause penalties to employers and in some cases even to managers.

It is generally the employee's responsibility to inform the employer about the need for an accommodation, related to a medical condition, to enable the employee to fulfill the essential duties of the job. Failure to clearly request an accommodation or provide this information has not always prevented lawsuits, however. In some cases, courts held that erratic employee behavior was a sufficient notice of need for an accommodation. In addition, a doctor, family member, or other qualified person can make requests "on behalf of" the employee. Employees cannot simply stop reporting for work; some notice of need is required by the FMLA.

In the workers' compensation area, every state has its own laws and regulations, but the claim for a work-related injury should always be reported within 24 hours of the injury. This timeframe gives the workers' compensation program time to assess the claim's validity. More importantly, care can be directed early in the process as allowed by state statutes.

The ADA, FMLA, and workers' compensation regulations overlap in several areas; employers must determine which one(s) apply to an employee's leave request. This overlap can raise questions regarding employer coverage, employee eligibility, length of leave, and medical documentation.

Employers operating in this overlap zone need to maintain communication with their employees and require appropriate medical documentation. When these best practices falter, cases start to run off the rails because most leaves contain too many nuances for employees to comply without ongoing guidance. Sending the employee a start-up letter or medical certification form is not enough.

Employers who require fitness-for-duty certification should have a uniform FMLA policy in the employee handbook and other written communication to employees. The employer must give the employee a list of the essential job functions for use in the certification. The certification states the employee is able to resume work following an FMLA leave, it can address the employee's ability to perform the essential functions of the job, and is signed by the employee's healthcare provider. Employers should not refuse to let an individual with a restriction return to work simply because the worker is not fully recovered from the injury. This mentality will likely result in an ADA violation.

The interactive process begins when an employer learns of the need for an accommodation. Even when an employer believes that no accommodation is possible, the ADA requires the "interactive process" to discuss the situation with the disabled worker; healthcare providers are often included. Rather than moving straight to the undue hardship argument when an employee requests an accommodation, employers should thoughtfully and completely evaluate the request. Does the proposed accommodation provide for safety of employees and customers (patients in the healthcare setting); does it remove any essential functions; will it negatively impact work or product quality? The interactive process may require multiple cycles to explore other possible job modifications, more leave time, or other alternatives.

Employers should not place the burden on the employee to identify open positions that might meet the employee's accommodation request. Yet it is imperative that employers document all efforts of an employee — or the lack of effort — to engage in this interactive process.

When employers consider all of these elements while managing an employee leave or claim, the overlapping processes of ADA, FMLA, and workers' compensation run more smoothly. Because the ADA interacts so significantly with the other two, the ADA interactive process is key to helping you avoid being sucked into the Bermuda triangle of HR law.

2017 Partnership Award Presented to Frank Alvarez at Compliance Conference

Congratulations to 2017 DMEC Partnership Award winner Frank Alvarez, JD, Principal at Jackson Lewis and Founder/Chairperson of the firm's Disability, Leave, and Health Management Practice Group.

Alvarez has been integral to the success of the DMEC FMLA/ADA Employer Compliance Conference over the years, serving as a speaker and panelist at each conference since 2012. Alvarez was an early proponent of focusing DMEC's spring conference on compliance, and his expertise in Family and Medical Leave Act and Americans with Disabilities Act compliance have earned him a reputation as a "can't miss" speaker.

So it was only fitting that Alvarez was honored at the DMEC Compliance Conference in Minneapolis this year,

2017 Partnership Award winner Frank Alvarez savors the moment

rather than the customary announcement at the DMEC Annual Conference.

"Frank first got engaged with DMEC through the Greater Boston chapter in the early 2000s, and since that time, has been a frequent speaker at both local and national DMEC events," said DMEC CEO Terri Rhodes. "He is always willing to step in, even at the last minute, which is what a good partner does."

Said Alvarez, "To be recognized in this way as offering value to this wonderful group of people and companies makes me feel humbled, proud, and very happy to be here today."

Paid Family Leave continued from page 15
under specified circumstances.

In a similar PFL risk factor, if the level of income replacement provided is so low that employees cannot afford to take leaves, that also could generate ill will. People initially assess a PFL benefit by the number of weeks provided, but it's the level of income replacement that will determine whether a PFL benefit is utilized.

Co-workers might be resentful when a new parent takes an extended leave, but "another issue is managers who want employees back as quickly as possible," said Alyona Richey, Senior Manager of Benefits at McDermott Will & Emery LLP. Some new fathers in their law firm take intermittent leaves to manage their workload during the busy season.

Even when employers outsource PFL administration, they still retain certain obligations. It's important to know what those obligations are, and how to meet them. Employers need to work closely with their PFL administrator to clearly define the qualification to receive the PFL, coordinate pay, ensure that leaves can be efficiently tracked, and manage the return-to-work process.

Conclusion

Paid family leave is a popular benefit that aids recruiting, according to employers that provide PFL. It may also boost engagement and productivity, especially when it's used to help support flexibility in a high-performance work place. PFL can be a complex benefit that has a learning curve for employees, their managers, and benefit administrators. Because the U.S. still has no overarching federal PFL laws, employers are more free to experiment with the numerous benefit configurations that are possible. By targeting PFL leave purposes and benefit levels, employers can develop customized programs that meet company goals with key employee populations.

Compliance Conference Sets New Records

The record-breaking number of attendees at the 2017 DMEC FMLA/ADA Employer Compliance Conference in Minneapolis — 479 in attendance was an 18% increase over last year, with 155 employers represented — only tells part of the story.

It was the quality of the speakers and professionals attending that highlighted the importance and value of the conference. Leading corporations such as Amazon, Boeing, Comcast, Xcel Energy, and Yale University sent staff to present, learn, and network.

According to feedback from conference attendees, they found what they came for. 100% of attendees who completed evaluations agreed or strongly agreed that they will "utilize ideas, information, or resources from this conference" in their organizations, and the conference met or exceeded expectations for 96% of those who completed evaluations.

"The speakers were tops!" said one attendee. Some speakers were singled out for praise, including Rachel Shaw for her engaging presentation and excellent resources, and Frank Alvarez for his expert take on FMLA and ADA compliance issues.

"The variety of speakers helped to

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- Approve an "above and beyond" accommodation for an initial limited time period.
- Maintain control by informing the employee that the company may discontinue the accommodation at any time, on the company's sole discretion. Document this position in writing.
- Consider asking employees to sign an agreement for the accommodation.
- Always be prepared to show that the employer did, in fact, go above and beyond legal requirements.
- Be prepared to provide a legitimate, non-discriminatory reason for why the company approved accommodations for some employees, but denied them to others. Explain why the company believed that an "above and beyond" accommodation would help that employee succeed or why that employee was strategically important to the company.
- Be consistent with time limitations, or the rationale for the limitations, when providing temporary accommodations.

Conclusion

Employers can enjoy the benefits of going above and beyond ADA requirements without suffering legal penalties. To achieve this, their accommodation programs must have clarity about essential job functions, and use protocols that prevent inflated employee expectations. "Above and beyond" accommodations help retain high performing employees and communicate to their co-workers that the organization values the workforce. By clarifying the company position and managing employee expectations during the accommodation process, employers can reduce their litigation risk. And if litigation does occur, they can increase the favorable outcomes.

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provide different opinions/perspectives, but also helped to reinforce common themes and best practices," said another attendee.

Many attendees also praised the networking opportunities. "I found it very helpful to hear about how other employers manage their leave and disability during the networking times," said one.

You can view photos and videos of the 2017 conference at www.dmec.org/compliance-conference/.

And be sure to save the date for the 2018 DMEC FMLA/ADA Employer Compliance Conference, Apr. 30-May 3 in Orlando, Florida.

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