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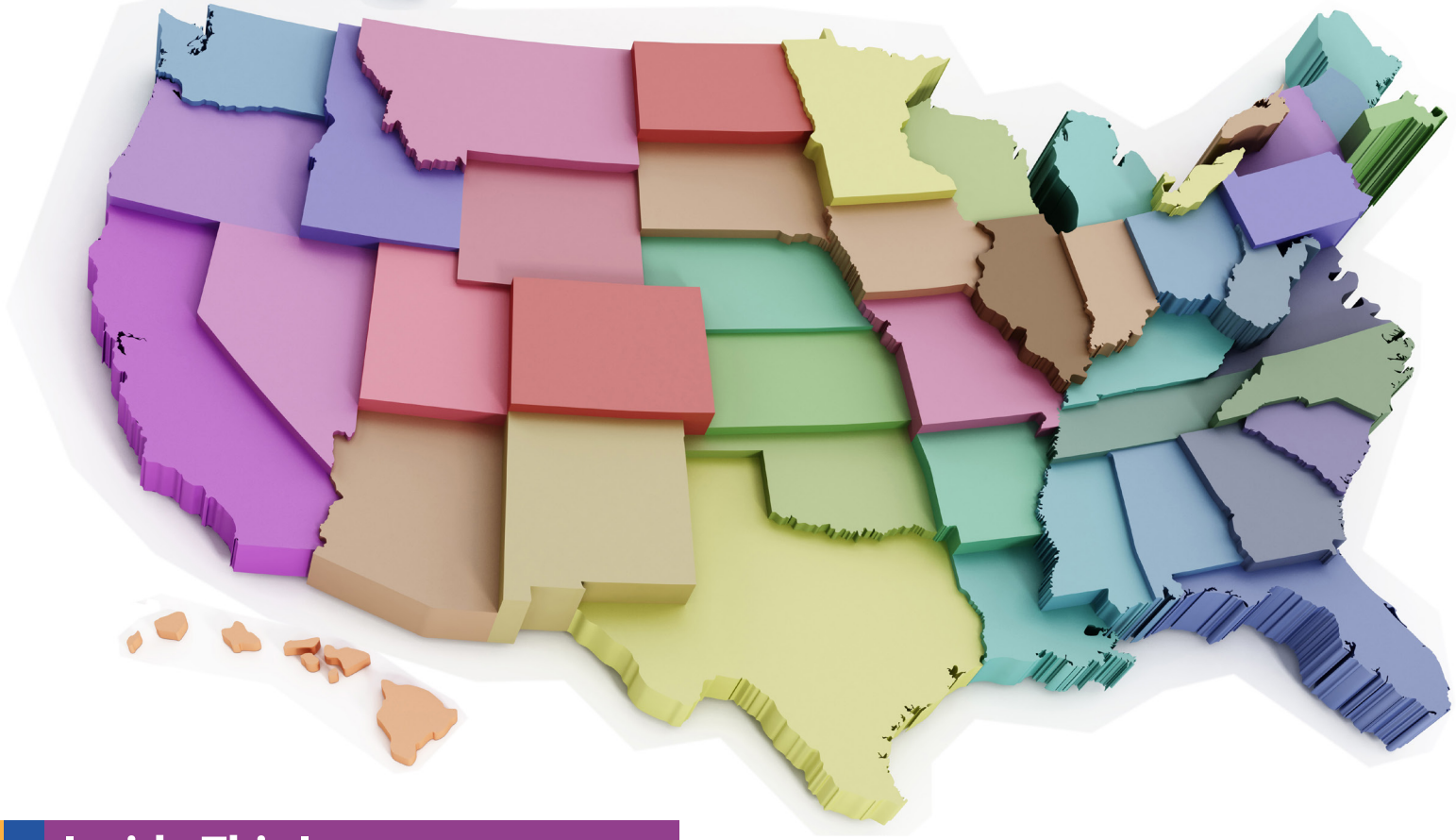
Official Publication of Disability Management Employer Coalition

Employment Practices Compliance



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DMEC Disability Management Employer Coalition

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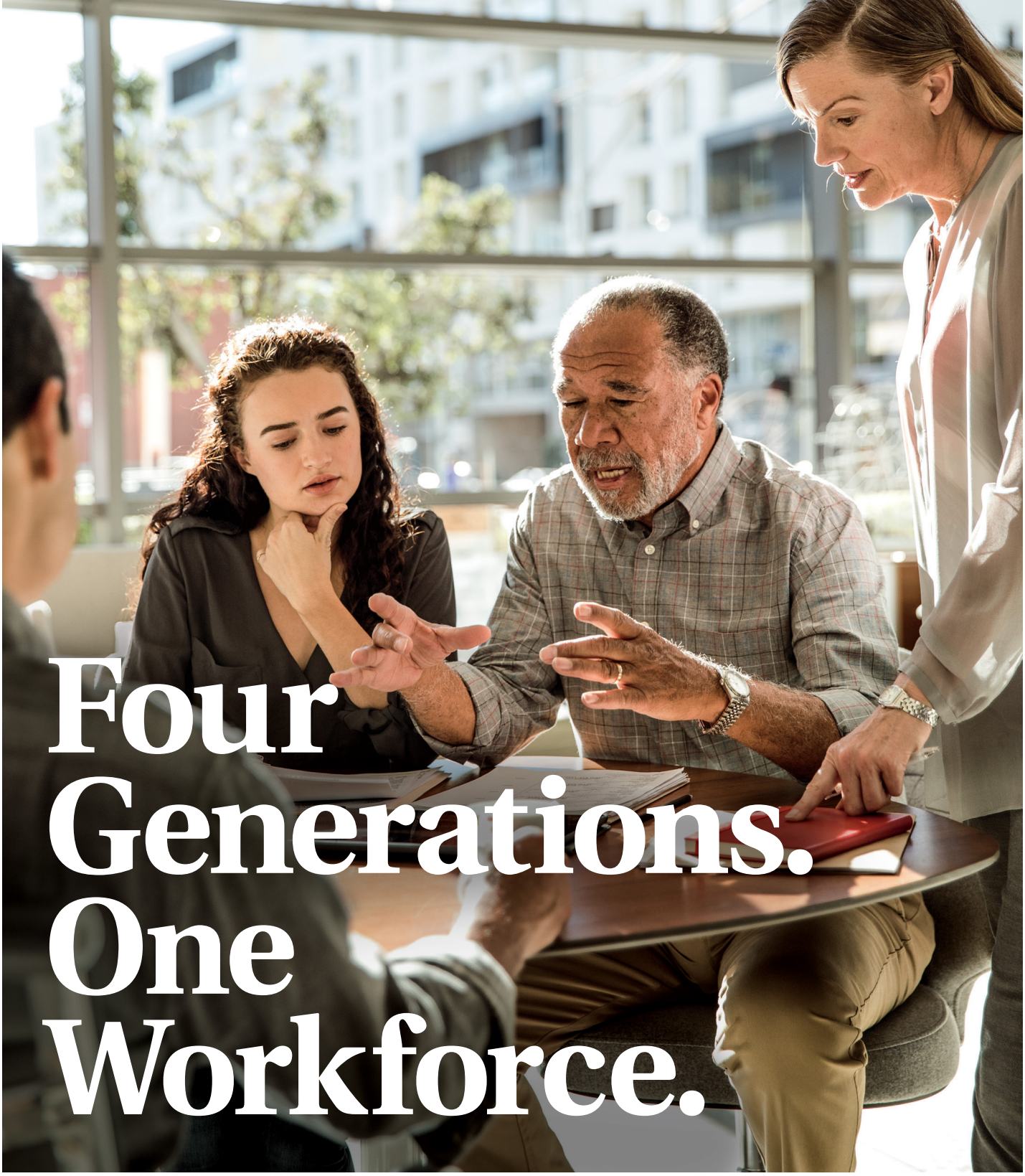

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Navigating life together

Terri L. Rhodes
CCMP, CLMS, CPDM, MBA
President and CEO, DMEC

Compliance: Possible

Today's workplace is unprecedented in its fragmented landscape for managing employee time off.

- We have mandated leaves of absence, paid family leave, and sick leave laws.
- We have company policies that augment state and federal time off programs.
- An estimated 60% of the U.S. workforce has access to Family and Medical Leave Act (FMLA) benefits, which are expanded by state, county, and municipal laws, not to mention state and company short-term disability policies.
- Paid sick leave laws have been enacted by nine states and more than 40 counties and municipalities.
- Paid family leave laws have been enacted by California, New Jersey, Rhode Island, New York, Washington state, and the District of Columbia. Large and influential, California is serving as a laboratory for complex state-federal interactions.
- There are literally hundreds of other state, county, and municipal laws. Some of the required time-off laws, such as voting, bereavement, school activities, bone and blood donor, victims of domestic abuse/crime (just to name a few) require detailed management and oversight.

"DMEC is developing a training resource for all managers and supervisors on the FMLA and the ADA."

Compliance in this current environment would be inconceivable using the manual tools and "sneaker net" communications we employed in the early years. And if the trajectory continues, managing these "time away from work" programs will be even more complex a year from now.

Employers today need solutions; they need timely dissemination when new regulations impact their workforce; they need to understand what their vendor partners' capabilities are; they need to know what resources are available to them; and they need it all now.

And yet, compliance is not impossible. This committed professional community of employers and vendors is working tirelessly to ensure that compliance is, in fact, possible.

The results of the 2017 DMEC Employer Leave Management Survey, which includes information from over 1,200 employers of various sizes and industries, confirmed that paid leave and outsourcing remain front and center. Our survey highlighted the increasing challenges we face and found more employers are relying on external resources and technology for compliance updates.

When employers explore solutions, they may find a one-stop shop fits their needs or that their leave management programs require more than one solution. Either way, the marketplace continues to expand to meet the growing compliance needs.

The survey also found that supervisors and other managers unfamiliar with the basics of leave laws and regulations are a leading driver of government enforcement actions. Employers of all sizes report difficulty training supervisors in this area.

Educating managers is a known solution for this problem. Respondents especially favor mandatory and online training, which is why DMEC is developing a training resource for all managers and supervisors on the FMLA and the ADA.

And finally, you'll find timely solutions and best practices for your compliance challenges when the DMEC community convenes at the 2018 FMLA/ADA Employer Compliance Conference in Orlando, April 30-May 3 — the one gathering devoted exclusively to covering leave compliance mandates. Please join us for this must-attend conference!

Terri L. Rhodes
DMEC CEO

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Compliance Memos

CM #6 Final ERISA Disability Claim Regulations In Force on Apr. 1

New Employee Retirement Income Security Act (ERISA) regulations governing disability claim administration take effect on Apr. 1. This rule-making process began in the Obama administration and had another review/comment cycle due to Trump administration efforts to reduce regulatory burden. While many of these rules are parallel to provisions in insurance or third-party administrator contracts, some may increase administrative burden. Compliance action plans will be important for six critical provisions: conflict of interest, expanded benefit denial notification, claimant right to review and respond, consequences for claim processing irregularities, non-English language notice, and limitation periods to bringing suit for denial of benefits. For more details, visit http://dmec.org/2018/02/09/changes-to-erisas-disability-claims-regulations-coming-apr-1/ and https://tinyurl.com/dol-ebsa-ERISA-regs4-1-18.

CM #7 Tax Reform Provides Employer Tax Credit for Family Leaves

The Tax Cuts and Jobs Act passed on Dec. 22, 2017, offers employers a substantial tax credit for providing paid family and medical leave (FML) to employees. The new tax credit sunsets at the end of 2019 unless Congress renews it. It has several requirements:

- Minimum qualifying leaves of two weeks, maximum of 12
- Employers must post a separate written FML benefit policy
- The policy must include a pro rata FML benefit for part-time employees, which yields a reduced tax credit for employers
- The full tax credit applies to qualifying full-time employees
- Pay is at least 50% of employees' regular earnings
- The ceiling amount for calculating the tax credit is 100% pay replacement of up to $6,000 per month per employee
- The tax credit is not available when paid vacation, personal, or sick leave are used concurrently with FML
- The credit is available to all employer sizes, with no minimum or maximum number of employees

For employees earning more than $6,000 per month, the credit applies only to the FML benefit paid on the first $6,000 earned per month. The base tax credit is 12.5% of the leave pay, with increments of 0.25% for each percentage point above 50% of the employee's regular wages (not to exceed a 25% credit). For example, if an employee earns $6,000 per month, one month of paid FML at 50% wage replacement would yield a tax credit of $375 (or 12.5% x $3,000), at 60% wage replacement the credit would be $540 (or 15% x $3,600), and at 100% wage replacement the credit would be $1,500 (or 25% x $6,000).

Every dollar of tax credit reduces an employer's tax obligation. This is a substantial credit that may incent some employers to offer the FML benefit, if they do not already.

For some employers that have concurrent use of multiple benefits, the decision to pursue a paid FML benefit may involve decisions about other benefits as well. Employers can use a Paid Leave Tax Credit Calculator to estimate the potential tax savings their voluntary paid leave programs can generate. To learn more, visit http://dmec.org/2018/02/23/paid-leave-can-contribute-employers-bottom-line/.

CM #8 Are You Prepared for New York Paid Family Leave?

The New York Paid Family Leave law (NY PFL) took effect on Jan. 1, 2018. Before the start date, employers were invited to take a survey quiz to assess if they were prepared for the new law, which had been in the news for more than 12 months. Only 28% of participating employers were

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By
Kelly D. Gemelli, JD
Of Counsel
Jackson Lewis, San Diego

Navigating the Interaction Between the FMLA and California Leaves: **Proceed with Caution**

The federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) contain overlapping and sometimes conflicting employee rights and employer obligations regarding California family leave. Because so many employers have operations in California and because this overlap can generate significant additional obligations, California family leave laws have national impact.

In addition, California's Fair Employment and Housing Act makes it a separate violation to fail to engage in the interactive process once an employee's leave under the FMLA/CFRA ends. If employers fail to engage in the interactive process, they cannot rely on a number of affirmative defenses that would preclude liability.

"Leave taken by an employee under CFRA typically runs concurrently with FMLA leave except where leave is taken under the FMLA for a disability due to pregnancy, childbirth, or related medical conditions."

Basic Entitlement

CFRA aligns with the FMLA in many areas, but there are significant exceptions. Both the FMLA and CFRA apply to employers with 50 or more employees on the payroll. This includes employees on the payroll who work part-time, on commission, interns, and employees who are on leave of absence but are expected to return to active employment.

The FMLA and CFRA also apply to all public employers, regardless of the number of employees. To complicate things further, in 2018, the California Parent Leave Act, S.B. 63, extended CFRA coverage to employers of 20 or more employees and all public agencies for *new child bonding* purposes. This new law significantly expands CFRA, which previously only applied to employers with 50 or more employees. Please note, however, that the new law only expands CFRA's *bonding* leave provision; it does not require employers with fewer than 50 employees to offer CFRA leave for *other* reasons, such as for the employee's or a family member's serious health condition.

To be eligible for the FMLA or CFRA, an employee must have worked for a covered employer for at least 12 months and must have worked at least 1,250 hours in the 12 months

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preceding the leave. Employees must also work at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.[1]

The FMLA and CFRA require covered employers to provide up to 12 weeks of unpaid, job-protected leave for an employee's own serious health condition; to care for a covered family member with a serious health condition; or to bond with a newborn, adopted, or foster child.[2] In addition, FMLA (but not CFRA) allows for leave for a qualifying exigency relating to a close family member's military service.[3] The FMLA (but not CFRA) also allows eligible employees up to 26 weeks of unpaid leave to care for a seriously ill or injured service member or veteran.[4]

How the FMLA and CFRA Interact

Leave taken by an employee under CFRA typically runs concurrently with FMLA leave *except* where leave is taken under the FMLA for a disability due to pregnancy, childbirth, or related medical conditions. Leave for pregnancy or pregnancy-related disability counts only toward the employee's FMLA leave entitlement and not toward the leave rights granted under CFRA. This is because CFRA has special provisions for leave taken for disability due to pregnancy, childbirth, or a related serious medical condition as a serious health condition of the employee.

As a result, an employee who exhausts FMLA leave for a pregnancy-related disability is still entitled to CFRA in order to bond with the newborn child. In the event an employee requests leave for her pregnancy, childbirth, or a related medical condition, employers also need to review the employee's leave request under California's Pregnancy Disability Leave Law (PDL).[5]

PDL applies to employers with five or more employees. If an employee is disabled by pregnancy, childbirth, or a related medical condition, she may qualify for up to four months of PDL. An employer may designate PDL as FMLA leave, but as stated above, CFRA specifically excludes pregnancy-related leave from coverage.[6] So when an employee's PDL/FMLA leave ends, she may then qualify for up to 12 weeks of CFRA bonding time leave, resulting in a potential total leave period of up to *seven months*.

For example, Betty, an employee of ABC Corporation, has been employed for nearly three years. ABC employs over 50 employees. She requested leave for her pregnancy and asked how much leave she is entitled to take. Generally, an employee on pregnancy disability will be disabled for 6 to 8 weeks following delivery. During the disability period, she will be on FMLA and PDL leave concurrently. Once the pregnancy disability ends, she will be eligible for CFRA leave for up to 12 weeks (any remaining FMLA leave will run concurrently with CFRA).

When FMLA or CFRA leave ends, an employee has a general right to be restored to the same or an equivalent position, identical to the original in terms of pay, benefits, working conditions, shift, schedule, and geographic location. Also, be aware that employers subject to the FMLA and CFRA are required to maintain group health insurance coverage for an employee on the same terms as if the employee continued to work.

Another example: Gary is an employee of ABC Corporation and has been employed for almost two years. He has requested leave for medical disability and has asked how much time he can take off. Gary will be eligible for FMLA and CFRA coverage concurrently, making him eligible for up to 12 weeks of unpaid leave.

Notification of Leave Entitlement

The clock starts running on employees' FMLA or CFRA leave when the employer designates it as FMLA or CFRA leave and gives notice of the designation to the employee. Be aware that an employee does not need to expressly assert rights under the FMLA or CFRA or use any special terms. The employee must state, however, the reason the leave is needed, such as for medical treatment or the expected birth of a child.

If the employer does not have sufficient information about the reason for the employee's use of leave, the employer should inquire further of the employee to determine whether the need for leave is FMLA- or CFRA-qualifying and to determine the expected start date and duration. See *Moore v. Regents of Univ. of Cal.* [(2016) 248 CA4th 216, 249], which held that "an employer bears the burden under CFRA, to inquire further if an

employee presents the employer with a CFRA-qualifying reason for requesting leave." The employee has a duty to respond to an employer's questions if they are designed to determine whether an absence is potentially FMLA- or CFRA-qualifying. Failure to do so may result in the denial of the leave request.

Please note, however, that medical privacy laws in California limit the type of information an employer may require on the certification. CFRA regulations prohibit employers from asking for certain specific medical information, including the diagnosis, symptoms, or serious health condition involved.[7] If an employee's leave request is protected by both the FMLA and CFRA, the greater protections of CFRA apply.

A common mistake is not understanding the difference between a "serious health condition" and a common ailment. A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a medical provider.[8] Typically, unless complications arise, minor ailments — such as the common cold, upset stomach, minor ulcers, headaches, routine dental work, earaches, and so forth — do not qualify as serious health conditions.

Family and medical leave laws also prohibit discrimination or retaliation against an employee for exercising rights under the FMLA/CFRA or for giving information or testimony about alleged violation of California or federal family and medical leave laws. Violating family, medical, parental, and pregnancy leave laws exposes an employer to a civil lawsuit or an administrative proceeding, and personal liability may fall on corporate officers, managers, and supervisors. Remedies available include financial awards to compensate for lost wages, benefits, and other monetary losses; emotional distress, punitive damages, reinstatement, and back pay, as well as significant exposure for attorneys' fees.

Interaction with the ADA and FEHA

Many employers believe that if an employee exhausts the FMLA/CFRA-mandated leave and still cannot return to work, their job is no longer protected. This is a big mistake. Even if the employee's leave is no longer covered by the FMLA/CFRA or was not covered in the first place, other protections may apply, including those created by the Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA).

Both the ADA and FEHA obligate employers to provide a "reasonable accommodation" to a qualified individual with a disability if that is needed to perform the essential func-

tions of the job as long as it does not impose an undue hardship on the employer.[9] Unlike PDL or FMLA/CFRA leave, leave as a reasonable accommodation under the ADA or FEHA does not have any statutorily set time limit. Rather, as with other types of reasonable accommodations, an employer's obligation to provide leave ends at the point at which the leave becomes an undue hardship for the employer. Neither the ADA nor FEHA requires employers to accommodate disabled employees by granting them indefinite or unlimited leave.

Conclusion

Each of the leave laws must be *analyzed separately* to determine an employee's leave rights. Where employees are requesting pregnancy-related disability leave, the interaction of the FMLA, CFRA, and California PDL may result in extended leave times. When an employee requests time off for a reason related to or even possibly related to a disability, the employer must determine the employee's rights under all of the relevant laws. The request should be treated as an ADA/FEHA reasonable accommodation request as well as a FMLA/CFRA leave request. This means that an employer should initiate an interactive process with the employee to determine their limitations and identify potential reasonable accommodations. In the event you have an employee requesting leave as an accommodation, proceed with caution, and consult with legal counsel before taking adverse employment actions.

References

1. See 29 USC §2611(4)(A)(i) for FMLA, and 2 Cal. Code Regs §11087(d)(1) for CFRA.
2. See 29 USC §2612(a) for FMLA, and Govt Code §12945.2(a) for CFRA.
3. See 29 USC §2612(a)(1)(E) for FMLA.
4. See 29 USC §2612(a)(3) for FMLA.
5. See Govt Code §12945 and 2 Cal Code Regs §11042(a) for California PDL Law.
6. See Govt Code §12945.2(c)(3)(C) and 2 Cal Code Regs §11093(b) for CFRA.
7. See 2 Cal Code Regs §11087(a)(1) for CFRA.
8. See 29 CFR §825.113(a) and 2 Cal Code Regs §11087(q) for CFRA.
9. See 42 USC §12112(b)(5)(A) for FMLA and Govt Code §12940(m)(1) for FEHA

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By
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ADA Leave Compliance:
Are You Sure Your House Is in Order?

Disability accommodations required under the Americans with Disabilities Act (ADA) include a broad array of adjustments, ranging from alterations to a workspace to the ability to work from home. Another type of accommodation has received more attention in the absence management industry lately: leave as an accommodation, a period of time off work designed to enable a disabled employee to return to work.

Employers can find themselves at substantial litigation risk if they do not carefully consider leave as an accommodation prior to terminating an employee who cannot return to work following an absence. To protect themselves, leave managers need to exhaust the interactive process by conducting a complete evaluation of requested accommodations. Employers have recently been hit with hefty judgments and Equal Employment Opportunity Commission (EEOC) consent decrees, proving that a one-size-fits-all approach can cost a company millions. It is in all parties' best interests to establish and utilize a comprehensive process to evaluate each accommodation for compliance.

"Determining whether a leave is a reasonable accommodation can be subjective... both the EEOC and court opinions emphasize that a case-by-case analysis is necessary."

Keeping It in Order: An Employer Checklist

Employers are recommended to use repeatable standards to determine whether an accommodation is reasonable and required under the ADA. There are three recommended tests to assess an accommodation request:

1. Is a leave of absence accommodation *reasonable* (plausible or feasible)?
2. Is a leave of absence accommodation *effective*? Will the time off enable the employee to return to work and perform the essential functions of the job?
3. Does a leave of absence accommodation impose an *undue hardship* on the employer?

The answers to these three questions can guide employers in determining whether time away from work is appropriate.

Test One: Is This Leave a "Reasonable" Accommodation?

An employer must engage in the interactive process upon any request for an accommodation, even after job-protected absence is exhausted, to determine if additional leave can

and/or must be offered as a *reasonable* accommodation.

Determining whether a leave is a reasonable accommodation can be subjective and may involve factors such as length and frequency of absences, potential unpredictability of intermittent absences, and establishing how long the leave can last and still be considered reasonable. Employers largely have to rely on their own judgment and analysis of each individual circumstance. There are few hard and fast rules when it comes to whether leave is a reasonable accommodation. In fact, both the EEOC and court opinions emphasize that a case-by-case analysis is necessary. Nonetheless, there are a few guidelines that can help provide direction to shape an employer's approach:

- An employer can expect an employee to provide an estimated return-to-work (RTW) date. Without an expected end date, an employer is not expected to be able to determine whether leave is a *reasonable* accommodation.
- The leave request must confirm to an employer that an employee can perform the essential functions of his or her position in the "near future." Because *near future* is not defined, employers are advised to use the three accommodation tests to help determine whether the leave is reasonable, effective, and not an undue hardship on the employer.

While the EEOC doesn't expect employers to offer *paid* leave as a reasonable accommodation, employers must treat all employees equally in this regard. If paid leave is offered to similarly situated employees, it must be offered to disabled employees.

Test Two: Is This Leave an "Effective" Accommodation?

After assessing whether an accommodation is reasonable, we must consider whether it will be effective. This means that the accommodation must enable the employee to perform the essential functions of the job. Employers can use the following criteria to determine whether a leave is effective in supporting this goal:

- The nature of the employee's disability and limitations
- The anticipated duration of the leave
- The employee's position, including essential and marginal functions
- How the leave will enable the employee to return to work to perform essential job functions
- The likelihood (not necessarily a certainty) that the employee will be able to perform essential job functions at the end of the leave

• The success or failure of past accommodations attempted for the employee

• Whether other accommodations (such as ergonomic adjustments, schedule changes, work from home, reasonable changes to job descriptions such as avoiding heavy lifting, etc.) could achieve a satisfactory result

Test Three: Would Leave Impose an Undue Hardship on the Employer?

Even if leave as an accommodation is reasonable and effective and other accommodations would not achieve a satisfactory result, one more criteria must be met. An employer is not required to provide leave as an accommodation if it will cause undue hardship on the employer's business.

The EEOC's criteria for undue hardship include:

• *Financial difficulty*: This may be difficult to prove, especially for large employers. To determine if an accommodation presents a financial hardship to the employer, the EEOC may relate the cost to the budget of the entire corporation or business unit (depending on several factors); at that scale, the cost of an accommodation may look relatively small. Also, before employers claim financial hardship, the EEOC expects them to explore third parties and outside resources to support the cost of a leave, such as state funding or tax credits.

• *Operational difficulty*: This includes whether an accommodation is unduly extensive, substantial, disruptive, or would alter the fundamental nature of the business operation.

When claiming hardship, employers should meticulously collect and document facts and evidence. Employers should be cautious before denying any accommodation based on undue hardship, including a leave. An employer may regard many accommodations as a hardship but should consider consulting with legal counsel before rejecting a requested accommodation and making adverse employment actions. The legal definition of *hardship* is sufficiently complex that what is an undue hardship for one employer may not be for another.

> *"For employers considering adverse employment action when employees request leave as an accommodation, it is essential to engage in a rigorous interactive process..."*

Additional Considerations: Impact of the Recent 7th Circuit Court Decision

The 7th Circuit Court of Appeals, in *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir., September 2017), recently disrupted the settled understanding of an employer's obligation to provide leave as an accommodation. Subsequent decisions have embraced Severson's approach, including a case in the 6th Circuit Court of Appeals, *Cooley v. E. Tenn. Human Resources Agency*, No. 17-5355 (Dec. 22, 2017). These cases shift the focus from whether a leave of absence accommodation is reasonable to whether the employee can be considered a "qualified individual with a disability."

In *Severson*, recognizing that a qualified individual with a disability is one who, with or without reasonable accommodation, can perform the essential functions of the job, the court held that the term *reasonable accommodation* is limited to those measures that will enable the employee to work. The court went on to conclude that an employee who needs long-term medical leave cannot work and thus is not a "qualified individual" under the ADA.

Leave Compliance continued on p. 29

It's All In a Name: Is Your Parental Leave Policy Inclusive?

By
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Implementing a new leave plan or policy can be difficult and complex, especially with parental/bonding leaves in which overlapping legal and cultural issues may generate powerful emotions.

The main factors to consider when implementing a parental leave plan are:

1 Your company's employee population (size, age, gender composition)

2. The duration of the leave

3. Current legislation

4. The name of the plan

5. Your company's values and culture

At RBC Capital Markets (RBC), we have two main U.S. business segments with two different employee populations, business personalities, and market competition. One of the businesses has many locations across the country with very few employees at each site, which makes it challenging to offer longer paid leaves. The other business prioritizes maintaining a competitive edge with other companies in the industry. Since our two main divisions are different in their populations and needs, we needed two separate parental leave plans. Both businesses offer 100% paid leave for new parents; however, the duration of the leaves differs for the two businesses.

Composition of your employee population is an important consideration if you are hoping to recruit and retain top talent of both Millennials and women. Equality and generous leave policies are important to most employees but especially to Millennials. Studies show that Millennials want their workplace to be aligned with their values. Also, recent generations consist largely of two-career couples, and many expect both parents to work and parent equally.

Another consideration is the type of industry and the number of employees at each location. Perhaps the type of your business or your small employee population will make it hard to offer a longer duration of parental leave.

Whether you choose 2, 6, 12, or 20 weeks of paid leave, it is important that each parent is offered an equal amount of bonding time, as required under Title VII of the Civil Rights Act. Your company can offer a period of paid time for pregnancy-related medical leave for pregnancy and childbirth as part of the *disability leave*, but each parent, regardless of gender, should be offered an equal amount of *bonding time*. It would violate Title VII if an employer provided more bonding time to the birth mother than the nonbirth parent.

Title VII prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion; it is enforced by the Equal Employment Opportunity Commission (EEOC). To ensure that pregnancy and birth-related leaves comply with Title VII, an employer should differentiate leaves related to *pregnancy disability* from those related to *bonding time* with a new family member. For example, an employer should have a disability-related pregnancy leave and a separate bonding leave that allows equal time for the birth mother and nonbirth parent, male or female.

The final factor to consider when implementing a parental leave policy is often overlooked: what to name the policy. In my over 10-year career in leave management, I have seen many policy names for bonding leave purposes. The wrong name can reinforce stereotypes and negate the goodwill an employer seeks to create by providing paid leave. By using terms such as "paternity leave" or "primary and secondary leaves," employers expose themselves to public relations issues and/or legal liability.

Paternity refers only to a male father of a child, which excludes same-sex female relationships. Primary- and secondary-caregiver leaves typically only offer the primary caregiver leave to the birth mother, offering the nonbirth parent (second-

ary caregiver) a shorter duration of leave. Using the terms *primary* and *secondary caregiver* in your policy assumes that families will have one primary caregiver who is supported by a partner with fewer caretaking responsibilities.

It also requires employers to ask employees about caregiving loads. Not only can this be invasive and administratively burdensome, but this parental leave model is usually not gender-neutral. This model enforces old stereotypes that raising children is a women's responsibility and men are secondary caregivers. It also indicates an assumed role of the birth mother having to do most of the initial parenting work. The homemaker/breadwinner family structure is antiquated. All parents, regardless of gender or family role, should be provided equal paid leave to bond with their children.

Litigation Trends

There has been an increase in EEOC sex discrimination cases against companies whose parental leaves don't offer the same bonding time benefits to the birth mother and nonbirth parent.

In 2015, a discrimination charge was settled against CNN and Turner Broadcasting for providing 10 weeks of paid leave to mothers but only two weeks to the other parent. In 2017, JP Morgan Chase was charged with sex discrimination because of a policy that provided "primary caregivers" 16 weeks of paid leave and "non-primary caregivers" only two weeks of paid leave. JP Morgan Chase did not allow fathers or nonbirth parents to utilize the primary caregiver leave unless they could prove that their spouse or domestic partner had returned to work or was medically incapable of caring for the child.

In August 2017, the EEOC sued Estee Lauder for sex discrimination. The charge claims that Estee Lauder violated federal law when it implemented and administered a paid parental leave program that automatically provides less parental leave to new fathers than to new mothers. The suit also claims that Estee Lauder provided flexible return-to-work opportunities to new mothers that were not offered to new fathers.

With many corporate benefit programs are still using terms such as *paternity* and *primary* and *secondary caregivers*, we may see more sex discrimination charges against employers that do not treat all parents equally. Employers should also avoid terms such as *mothers* and *fathers* in their policies. Keep in mind that not all families consist of a mother and a father.

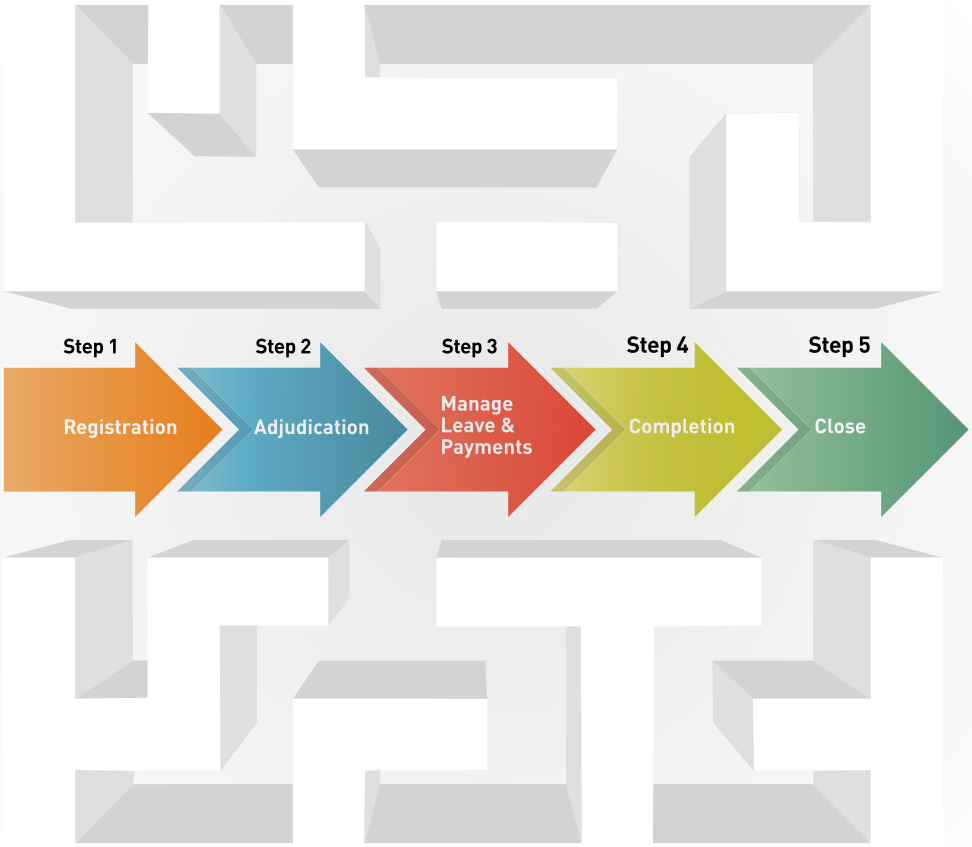
Program Showcase continued on p. 23

Introducing FINEOS Absence

Simplify the Complex

Absence from work costs employers around **22% of total payroll**, but with **over 100 reasons to be absent from work** and an ever-changing regulatory landscape (federal, state, municipal regulations, including FMLA, Paid Family Leave, and Disability Benefits Law) managing absence can be a very complex problem to solve.

Enter FINEOS Absence. With a simple 5-step process designed to help insurers, employers, and employees easily navigate the absence claim from registration to close, this solution brings clarity and peace of mind to anyone involved in managing absence.



FINEOS

To learn more about FINEOS Absence, visit **https://www.fineos.com/products/fineos-absence/** or visit us at our booth at the DMEC Compliance Conference and DMEC Annual Conference.

The FMLA Evaluation Roadmap: How to Navigate Complex FMLA Requests

By
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Leave Administration Product Manager
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We've all experienced those challenging Family and Medical Leave Act (FMLA) requests. Perhaps an employee asks for time off to care for their 32-year-old child or to undergo cosmetic surgery. Any number of situations can make you scratch your chin and think — is that really covered under the FMLA?

The best way to handle each unique leave situation with confidence is by relying on a three-step roadmap and consistently applying it to every situation. This goes beyond FMLA leaves to include state- and company-specific leaves that may apply to a request. This approach helps break down the complexities of a leave and lead you to the correct outcome.

Three Steps of the Roadmap

1. *Determine Eligibility*

To evaluate the employee's eligibility for FMLA leave, consider three factors:

- The employee must have worked for the employer for a minimum of 12 months (these need not be consecutive) before the start of the leave.
- The employee must have worked for the employer for at least 1,250 hours in the 12 months preceding the start of the leave.
- The employee must work at a location where at least 50 employees are employed.

2. *Determine Applicability*

Is the leave reason qualified? Is the relationship qualified?

Once you've determined that your employee is eligible for leave, you can evaluate whether the leave reason and relationship are qualified. Qualifying leave reasons include:

- an employee's own serious health condition;
- absence to care for a family member with a serious health condition (spouse, child, or parent);
- the birth or care of a newborn child within a year of the child's birth (called "bonding" leave);
- placement of a child with the employee for adoption or foster care (bonding);
- qualifying exigency for the employee's parent, child, or spouse called to active military duty; and
- care for an injured servicemember.

If your employee is requesting leave to care for a family member, you need to ensure it involves a qualified family member, which could include parents, spouses, sons, and daughters.

A parent is:

- a biological, adoptive, step-, or foster parent — for FMLA purposes, a parent does not include in-laws;
- someone who stood in loco parentis to the employee or someone for whom the employee stands in loco parentis.

A spouse is:

- a husband or wife as defined or recognized in the state where the individual was married, including individuals in a common-law marriage;
- a husband or wife in a marriage validly entered outside the country, if the marriage could have been entered into in at least one U.S. state.

A son or daughter is:

- a biological, adopted, foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis who is under 18 years of age;
- a child who is 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave begins; if the leave is to care for a son or daughter who is an injured service member, age is not a factor.

3. *Certify*

Is the certification complete and does it support the leave request?

The next and last step on the road-

map is certification. The FMLA allows an employer to require an employee to supply a certification supporting the leave request. You must give your employee notice that a certification is required, and it is a best practice to be consistent about the situations for which you do or do not require a certification.

When you decide to require certification, you must give your employee 15 calendar days to supply it. You can then evaluate whether the certification supports the leave request.

The Roadmap in Real-world Situations

Situation 1: Time Off "As Needed"

Tom works full time for a small firm with 150 employees located in Denver, CO. He's been employed for eight years and requests time off to undergo knee surgery. His provider certifies time off "as needed," rather than a finite period of time.

Should Tom's leave be certified? Let's follow the roadmap.

1. Is he eligible? Yes, Tom satisfies the 12 months of service and 1,250 hours requirement, and his employer is subject to the FMLA.

2. Is the leave reason qualified? Yes, Tom is requesting time off for a serious health condition.

3. Does the certification support the leave time? Typically, the provider would certify a finite period of time for a routine surgery. Tom's certification is considered open-ended and may require additional information.

Some absence certifications allow for absence "as needed" or on an "unlimited" basis, and those may not align with a medical condition that appears finite. In these situations, the employer can ask the provider for clarification on the initial certification or pursue a second opinion.

Tom's employer decided to ask for clarification, which was provided. Tom needs to be out for a period of six weeks following his surgery. Following that, Tom may return to work but could require physical therapy every few days lasting up to two hours per session. Given the clarification, Tom's leave can be accurately certified.

Situation 2: The Adult Child

Sally has worked full time for a large multi-state employer for the past five years. Her 17-year-old daughter Amy was recently diagnosed with cancer and will be treated with chemotherapy. The treatment will stretch over the course of several weeks and span her daughter's eighteenth birthday. Can Sally take FMLA leave before Amy's eighteenth birthday? How about after that birthday?

1. Is she eligible? Yes, Sally satisfies the 12 months of service and 1,250 hours requirement and works at a location with several hundred employees.

2. Is the leave reason qualified? Yes, Sally is requesting time to care for a qualifying family member due to a serious health condition.

3. Does the certification support the leave time? Yes; however, additional validation should be considered when Sally's daughter turns 18.

Sally's leave request should be approved for all time supported by the certification before her daughter's eighteenth birthday. As of her daughter's eighteenth birthday, additional validation is needed and includes confirming Amy had a mental or physical disability at the time the leave commenced, is incapable of self-care, and has a serious health condition, and needs care because of it. If validation is provided, time following her eighteenth birthday should also be approved.

Evaluating whether an adult child is incapable of self-care should include determining whether there are at least three activities of daily living (e.g. bathing, dressing) for which the child requires assistance.

Situation 3: Schedule Accommodations

Monique works in a call center. Call volume on Mondays is significantly higher than it is the rest of the week. Monique has been out on an approved

FMLA leave for four weeks due to shoulder surgery. She is ready to return to work but will have physical therapy twice per week for the next few months. She has requested reduced schedule leave so that she can attend physical therapy on Monday and Thursday afternoons.

Her supervisor is concerned about not having enough coverage on Mondays. What options does she have?

1. Is Monique eligible? We know Monique has been out on an approved FMLA leave for this condition, so yes, she is.

2. Is the leave reason qualified? Yes, we know that Monique's absence for her condition plus the following treatment (physical therapy) is a qualified reason.

3. Does the certification support the leave time? The certification that was submitted indicates that Monique needs to attend physical therapy twice per week. However, it does not indicate that the treatment must be on Monday and Thursday.

The FMLA requires that an employee make a reasonable effort to schedule the treatment so as not to disrupt the employer's operations. In this situation, the employer spoke with Monique, and they determined that physical therapy was also available on Tuesdays and Fridays. The leave was approved using this schedule.

Conclusion

Consistently applying this roadmap will help ensure that your employees' FMLA requests are addressed in a compliant manner and should begin to break down complex scenarios into manageable steps with predictable outcomes. We regard this roadmap as a due-diligence tool for managing FMLA claims, whether for vendors or employers managing claims in-house.

Program Showcase continued from p. 19

Does the future hold a state or federally funded parental leave similar to paid parental leaves offered in other countries? The Trump administration has discussed a six-week paid parental leave, but this underwhelming proposal was inadequate from the start. The original proposal excluded fathers, adoptive parents, and all parents who didn't physically give birth. This was widely criticized by parents and policymakers for its ignorance of the realities of the modern American family structure. Trump's proposal now includes all parents, but its budget and structure present severe challenges, as each state would be required to implement its own paid leave program.

Conclusion

Using the terms *birth mother* and *nonbirth parent* makes corporate policy much more inclusive and would cover every family situation — as long as the birth mother and nonbirth parent are offered an equal amount of paid time to bond with their newborn baby or adopted child.

State Family and Medical Leave and Parental Leave Laws

State	Coverage/Eligibility	Family Medical Leave Provisions (*unpaid unless noted*)	Provides Leave to Care for:
California	Private employers with 50 or more employees and all public-sector employers	Up to 12 weeks of unpaid family leave plus 4 months of maternity disability may be combined for a total of 28 weeks per year.	Child, spouse, parent, domestic partner, child of domestic partner, stepparent, grandparent, grandchild, sibling, or parent-in-law
California (paid)	Employees who have worked for an employer for at least 12 months and who have 1,250 hours of service during the 12 months prior to the leave	The California Paid Family Leave insurance program provides up to 6 weeks of paid leave to care for a seriously ill child, spouse, parent, or registered domestic partner or to bond with a new child. The benefit amount is approximately 55% of an employee's weekly wage, from a minimum of $50 to a maximum of $1,067. The program is funded through employee-paid payroll taxes and is administered through the state's disability program.	Child, spouse, parent, or registered domestic partner
Connecticut	All employers with 75 or more employees, except private or parochial elementary or secondary schools. Employees who have 1,000 hours of service with an employer during the 12-month period before the leave	Up to 16 weeks in 2 years for the birth or adoption of a child, placement of child for foster care, to care for a family member with a serious medical condition, for the serious medical condition of the employee, or to serve as an organ or bone marrow donor	Child, spouse, parent, civil union partner, parent-in-law, or stepparent
District of Columbia	Any public or private employer. Employees who have at least 1,000 hours of service with an employer during the 12-month period prior to leave	Up to 16 weeks of family leave, plus 16 weeks of medical leave for employee's own serious health condition during a 2-year period. Leave must be shared by family members working for the same employer.	All relatives by blood, legal custody, or marriage, and anyone with whom an employee lives and has a committed relationship
Hawaii	Private employers with 100 or more employees. Employees who have worked for 6 consecutive months. Excludes public employees.	Up to 4 weeks per year. Permits intermittent leave for birth, adoption placement, and to care for a family member with a serious health condition. Does not apply to employee's own health condition or placement of a foster child. Does not require spouses to share leave.	Child, spouse, parent, in-laws, grandparents, grandparents-in-law, stepparent, or reciprocal beneficiary
Maine	Private employers with 15 or more employees; all state employers and local governments with 25 or more employees	Up to 10 weeks in 2 years for the birth of a child or adoption of a child age 16 or younger. Includes leave to be an organ donor. Does not require spouses to share leave.	Child, spouse, parent, sibling who lives with employee, civil union partner, child of civil union partner, or nondependent adult child
Massachusetts	Employers with 50 or more employees	Up to 24 hours of leave per year to participate in children's educational activities or accompany a child, spouse, or elderly relative to routine medical appointments, under the Small Necessities Leave Act.	
Minnesota	All employers with 21 or more employees. An employee who has worked for an employer for at least 12 consecutive months immediately preceding the request and whose average number of hours per week equal one-half of a full-time equivalent position. All employers with at least 1 employee for school activities leave only.	Up to 6 weeks for the birth or adoption of a child. Does not require spouses to share leave. Permits employees to use personal sick leave benefits to care for an ill or injured child on the same terms as for the employee's own use. Up to 10 working days when a person's parent, child, grandparents, siblings, or spouse who is a member of the U.S. armed forces has been injured or killed while in active service. Up to 40 hours to undergo a medical procedure to donate bone marrow or an organ or partial organ.	Child, spouse, parent, grandparent, or sibling
New Jersey	All employers with 50 or more employees. Employees who have worked for an employer for 12 months and who have at least 1,000 hours of service during those 12 months.	Unpaid leave of up to 12 weeks in 24 months, not to exceed more than 6 weeks in 12 months, to care for a child anytime during the first year after that child's birth or adoption or to care for a seriously ill child, spouse, parent, or domestic partner. Does not provide leave for the employee's own serious health condition. Intermittent leave is limited to 42 days in 12 months. Does not require spouses to share leave.	Child, spouse, parent, in-laws, or domestic partner
New Jersey (paid)	Employees who have worked 20 calendar weeks or who have earned at least 1,000 times the state minimum wage during the 52 weeks prior to leave	Paid leave provides up to two-thirds of wages up to $524 per week for 6 weeks. Provides that any paid family leave runs concurrently with FMLA or NJFLA and that other types of available leave must be used before taking paid family leave. Provides that leave may be paid, unpaid, or a combination of both.	Child, parent, parent-in-law, grandparent, spouse, domestic partner

For state laws for school-related parental leave, see page 46.
For state and local paid sick leave laws, see page 30.

State	Coverage/Eligibility	Family Medical Leave Provisions (*unpaid unless noted*)	Provides Leave to Care for:
New York (paid)	All private employers. Employees with a regular schedule of 20+ hours per week are eligible after 26 weeks of employment. Employees working fewer than 20 hours per week are eligible after 175 days worked. Public employers may opt into the program. Public employees represented by a union may be covered if paid family leave is collectively bargained.	The maximum leave allowed over every 52-week period is increased over a period of 4 years. Starting Jan.1, 2018, the maximum leave period is 8 weeks. From Jan. 1, 2019-Jan. 1, 2020, the maximum leave period is 10 weeks and becomes 12 weeks starting Jan. 1, 2021. The maximum benefit amount is 50% of an employee's average weekly wage or 50% of the state average weekly wage starting in 2018. It increases annually to 55% in 2019, 60% in 2020, and 67% in 2022.	Child, spouse, parent, parent-in-law, step-parent, grandparent, grandchild, domestic partner, or a person with whom the employee has or had an in loco parentis relationship
Oregon	All employers with 25 or more employees. Employees who have worked at least 25 hours per week in the past 180 days.	Up to 12 weeks per year. An additional 12 weeks per year is available to care for the employee's ill or injured child who does not have a serious health condition but who requires home care. Prohibits two family members working for the same employer from taking concurrent family leave except under certain conditions. Allows an employee to substitute any available paid vacation or sick leave. Allows leave to be used to deal with the death of a family member.	Child, spouse, parent, grandparent, grandchild, or parent-in-law, or a person with whom the employee has or had an in loco parentis relationship
Rhode Island	Private employers with 50 or more employees. All state government employers. Local governments with 30 or more employees. Full-time employees who have been employed for 12 consecutive months and who work an average of 30 or more hours per week.	Up to 13 weeks in 2 years for the birth or adoption of a child, age 16 or younger, or to care for a parent, child, spouse, or in-law with a serious medical condition	Child, spouse, parent, employee's spouse's parent
Rhode Island (paid)	All private-sector employers and public-sector employers who opt into the program	The Rhode Island Temporary Caregiver Insurance Program provides 4 weeks of paid leave for the birth, adoption or fostering of a new child, or to care for a family member with a serious health condition; up to 30 weeks of paid leave for a worker's own disability. The program is funded by employee payroll taxes and administered through the state's temporary disability program. It provides a minimum benefit of $72 and maximum of $752 per week, based on earnings.	Child, parent, parent-in-law, grandparent, spouse, domestic partner
Vermont	All employers with 10 or more employees for leaves associated with a new child or adoption. All employers with 15 or more employees for leaves related to a family member's or employee's own serious medical condition. Employees who have worked for an employer for one year for an average of 30 or more hours per week.	Up to 12 weeks in 12 months for parental or family leave. Allows the employee to substitute available sick, vacation, or other paid leave, not to exceed 6 weeks. Does not require spouses to share leave. Provides an additional 24 hours in 12 months to attend to the routine or emergency medical needs of a child, spouse, parent, or parent-in-law, or to participate in children's educational activities. Limits this leave to no more than 4 hours in any 30-day period.	Child, spouse, parent, parent-in-law
Washington	**Washington Family Leave Act (WFLA):** Employers who employ 50+ employees for at least 20 workweeks annually within 75 miles. Employees must have worked at least 1,250 hours during the 12 months prior to when the leave is to commence. **Washington Family Care Act (WFCA):** All employers. An employee who has been employed for at least 680 hours during his or her qualifying year.	Washington Family Leave Act provides up to 12 weeks of leave during any 12-month period for the birth of a child, the placement of a child for adoption or foster care, to care for a family member with a serious health condition, or because of a serious health condition that makes the employee unable to perform the functions of the job. Washington Family Care Act allows workers with available paid sick leave or other paid time off can use that leave to care for a sick child with a routine illness; a spouse, registered domestic partner, parent, parent-in-law, or grandparent with a serious or emergency health condition; and an adult child with a disability.	Child, spouse, parent, parent-in-law, grandparent, or state registered domestic partner
Wisconsin	Employers who employ at least 50 individuals on a permanent basis, including any state government entity. An employee who has been employed by the same employer for more than 52 consecutive weeks and who has at least 1,000 hours of service during that time.	Up to 6 weeks of leave for the birth or adoption of a child; up to 2 weeks of leave to care for a child, spouse, parent, domestic partner, or parent of a domestic partner with a serious health condition; and up to 2 weeks of leave for the employee's own serious health condition. Does not require spouses to share leave. Allows an employee to substitute employer-provided paid or unpaid leave for portions of family or medical leave.	Child, spouse, parent, domestic partner, or parent of a domestic partner

Source: National Conference of State Legislatures, 2016 and DMEC, 2018.

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How to Use Surveillance to Combat Leave Abuse

By
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One of the greatest concerns employers still face with the Family and Medical Leave Act (FMLA) is abuse. But while most leave professionals know about the administrative tools written into the FMLA to curb leave abuse, it's still an ongoing, significant concern for employers.

After a leave is approved, the administrative tools are sometimes inadequate to address abuse. Worse, the number of state and local paid leaves are growing, and most are designed around the FMLA; so as they grow, so will concerns of abuse and the need for new ways to curb it.

Many employers initially are averse to the idea of surveillance. They perceive it to be high-cost, high-risk, and difficult to manage, and in most cases, leaves are unpaid, so the cost is hard to justify. But in my experience, surveillance can be a valuable option for a small number of difficult, strategic cases. If planned carefully and strategically, surveillance can put you in a better position to gather critical evidence when adverse employment action is appropriate.

What Is Meant by Surveillance?

Surveillance is the process of hiring a private investigator service to validate that time missed from work is indeed for the reason of the leave. The emphasis here is that the investigation is intended to validate the time — not necessarily the health condition itself. While surveillance is often an excellent way to validate the health condition itself, I found that in the vast majority of leaves, the health condition was not an issue but rather whether the employee was using the time appropriately.

This contrasts with workers' compensation (WC) investigations, which focus on the health condition or its severity. There is flexibility in when surveillance can be conducted for WC cases, and they are often conducted on evenings or weekends. But for FMLA and related leaves, to validate whether time is being used appropriately, surveillance should only be conducted during the employee's regularly scheduled work time.

Three Prerequisites for Surveillance

Surveillance is a strategic option under three specific circumstances:

1. Repeated patterns of absence predictability. Can an employee's absences be reasonably predicted? Perhaps an employee has requested vacation time in the past and was denied the time off, only to call out on FMLA leave that same day. Or an employee consistently takes intermittent FMLA leave seasonally, such as after Super Bowl Sunday or during hunting season. Some employees take intermittent leave immediately when time is regained. In instances like these, perhaps the employer already requested a provider to review the pattern or the leave was recertified — yet the questionable patterns continue. Being able to reasonably predict a future absence based on demonstrated patterns will help you select the best day for surveillance.

2. Leave is for the employee versus a family member. Leaves that are approved to care for a family member can be tricky to investigate. If the family member is incapacitated, it is difficult to interpret whether an employee's activities are in relation to the leave. One employee on approved leave to care for her parent was observed going to the bank, drug store, grocery store, etc. It was impossible to discern whether those errands were for herself or her parent. In another case, an employee who was approved to care for her child was observed to be home all day, but it was difficult to determine whether she was home to tend to the child's condition or she just didn't have childcare that day. Courts have held that care under the FMLA does not require medical treatment and is not restricted to any particular place (*Ballard v. Chicago Park Dist.*).

3. A flare-up of the medical condition is observable. Test every investiga-

tion by asking: after a day observing an employee's activities, will the evidence answer whether their activities are consistent with the condition? As a leave professional, you should have access to the available medical facts, so you can tell the investigator what to look out for — a back condition, a knee condition, etc. — in order to capture proper photographic evidence. Avoid investigating cases where the condition is behavioral; I had an employee with depression observed, and she went shopping for most of the day. Since shopping is therapeutic for depression, "retail therapy" was an acceptable activity. Cases in which the health condition would be noticeable during a flare-up yield the most useful results.

The Most Efficient Way to Work with an Investigation Firm

If you don't have an existing relationship with a private investigation firm, don't wait until you need one. If your leaves are currently being outsourced, check with your administrator. Most leave administrators, especially those who also administer disability claims, are well versed in using this type of service and will offer it at a reasonable cost to assist with logistics. Smaller or less sophisticated administrators may not offer this service but should welcome the idea from their clients.

Your organization may already have a contract with a firm to investigate workers' compensation claims or may have a corporate security department. This provides an established billing process and possibly a prenegotiated price. If not, as you search for a firm, be sure to confirm whether they serve your particular location(s).

"If the employee calls out of work as predicted (i.e., takes an FMLA day), the investigator can be stationed at their residence at the beginning of the workday."

I'm Ready to Investigate. Now What?

Timing is everything.

If you have the approval and budget to proceed, it's critical to investigate during a missed workday while the employee is on approved leave. Remind the investigators on each case that the request is for potential leave-time abuse and not workers' compensation, in case they need to refocus from medical issues to time-use issues.

Ideally, the investigation should be scheduled in advance using a predicted absence date in order to have the investigator in place at the start of the workday. If the employee calls out of work as predicted (i.e., takes an FMLA day), the investigator can be stationed at their residence at the beginning of the workday.

In one case I worked on, an employee was expected to call in sick on a particular Friday for his back condition, as he had on multiple Fridays before. Upon arrival at his residence, just prior to the start of the workday, the investigator saw a kayak strapped to his vehicle. The employee did indeed call in sick and shortly afterward drove to a kayaking spot and was seen unloading the kayak and paddling off into the water.

Another time, an employee who often left work early citing FMLA leave for her child had given advance notice she was leaving work early. An investigator was stationed at her work location and observed her going to a firm that assists with filing income tax returns; no children were present.

If an investigator is in place on a day when the employee is expected to call out and the employee instead reports to work, the investigator ends the surveillance and charges a prorated or minimum charge.

But sometimes you don't have the luxury of planning the investigation in advance. Once you have established a process, you may need to get an investigator in place immediately. This helps to contain some costs, but it runs the risk that an investigator may not be available and that the employee is not at home.

How to Use the Results

It's important to prepare yourself for what you might find out. You may discover something disheartening about your employee, but as a leave professional, it is your responsibility to interpret the results objectively and only as it relates to the leave.

Here are some questions to ask yourself when interpreting results:

- Are these activities really in conflict with the health condition?
- Do any of these activities directly contradict the information the employee provided when calling out of work?
- Do I need to involve any internal or external partners, in addition to employment counsel?

Keep in mind that court cases have allowed employees short breaks for personal activities even during leave time to care for a family member; after all, they are allowed breaks and lunch time at work.

My most successful investigation involved an employee with a heart condition that would render a person bedridden for days. Concerns over this employee's time-usage escalated, and it met the profile described above, so an investigation was conducted over the course of a few days. On the third day, she called out of work citing bedrest. Shortly afterward, she was seen running errands all over town with her significant other.

Upon her return to work, a human resources representative asked her how she was doing, and she voluntarily offered up that she was on bedrest the last few days without leaving the house. She was informed that "someone saw her at [store]," which she denied. There is case law that supports termination when the employee is being untruthful and therefore violating the business' code of conduct (*Tillman v. Ohio Bell Telephone Co.*). When she was advised of the photographic evidence, her cover story quickly unraveled, and subsequently, her employment was terminated.

In another case, a similar conversation was held that did not result in employment termination but served as a warning signal to the employee. It resulted in less missed time, improved morale of the team, and served as a warning to her colleague friends as well.

Conclusion

Surveillance is sometimes the best and only option to manage potential cases of leave abuse. Absence management professionals are correct to protect employee rights and avoid inappropriate risks to their organization. But when used in a small number of strategic cases, investigation is appropriate and can positively impact employee attitudes about using leave appropriately.

Leave Compliance continued from p. 17

The court acknowledged that this analysis leaves open the possibility that a brief period of leave to deal with a medical condition could be a reasonable accommodation in some circumstances. This would include intermittent time off or a short leave of absence. But the court was unequivocal in stating that a medical leave spanning multiple months does not permit an employee to perform the essential functions of the job, therefore removing the employee from the definition of a "qualified individual."

The court did not hesitate to reject the EEOC's interpretation of leave as an accommodation, calling the agency's interpretation "untenable," further stating that "a long-term leave of absence cannot be a reasonable accommodation" and "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working."

Employers, however, should be cautious about making dramatic changes in their accommodation policies. The EEOC plainly interprets the ADA to require a leave of absence as a reasonable accommodation in many circumstances — and the EEOC is the agency that will first receive a claim of disability discrimination. Moreover, a history of sizable judgments and consent decrees should continue to serve as a warning to employers considering curtailing leaves as an accommodation.

Conclusion

Employers can find themselves in a difficult situation when it comes to leave as an accommodation under the ADA. For employers considering adverse employment action when employees request leave as an accommodation, it is essential to engage in a rigorous interactive process with thorough, individual evaluations to ensure ADA compliance. The three tests outlined can help employers stay on the right side of the law, but remember: the answers uncovered are likely to be subjective. Proactively establishing a clear process and assessing each request on a case-by-case basis will allow an employer to be prepared when an employee requests leave as an ADA accommodation.

Paid Sick Leave Laws Expand to New States, Counties, and Municipalities

By
Michael Soltis, JD
Blog Author
Paid Sick Leave at Work

The vast and complex patchwork of paid sick leave laws continues to expand, with a new law enacted in January 2018 and one new law enacted and eight taking effect in 2017. To prevent further patchwork fragmentation, six states in 2017 barred political subdivisions from enacting such a law.

More than 40 jurisdictions now have paid sick leave (PSL) laws. Nine states — Arizona, California, Connecticut, Maryland, Massachusetts, Oregon, Rhode Island, Washington, and Vermont — are joined by the District of Columbia; Montgomery County, MD; and Cook County, IL. Both chambers of the Maryland legislature voted in January to override their governor's veto of the law, and the law took effect on Feb. 11. Among municipalities, more than 30 have PSL laws, including 13 in New Jersey and eight in California.

New PSL Laws

Newest of the new is a PSL law passed by the Austin City Council on Feb. 16. It is effective Oct. 1, 2018 for employers with more than five employees. For smaller employers, it is effective Oct. 1, 2020.

It requires private sector employers with 15 or fewer employees to provide employees who work at least 80 hours within the city in a calendar year to accrue PSL at the rate of one hour for every 30 hours worked, up to 48 hours annually. The accrual cap for employers with more than 15 employees is 64 hours annually.

Washington state's new PSL law took effect on Jan. 1, 2018, and to more closely align with that, Seattle and Tacoma amended their sick leave ordinances, while Spokane totally nullified its law.

Rhode Island enacted the only new PSL law in 2017, the fewest number of such new laws in a calendar year since 2010. In Nevada last year, the legislature passed and the governor vetoed a PSL bill. In the lone paid sick leave ballot referendum in 2017, Albuquerque voters narrowly rejected a PSL initiative.

The eight new paid sick leave laws with effective dates in 2017 were in: Arizona; Berkeley, CA; Santa Monica, CA; Cook County, IL; Chicago, IL; Minneapolis, MN; St. Paul, MN; and Vermont.

Attempting to prevent further fragmentation, six states passed "preemption" laws to bar political subdivisions from enacting PSL laws: Arkansas, Georgia, Iowa, Ohio, Rhode Island, and South Carolina. There are now 22 preemption states. It remains to be seen if Texas will pass a pre-emption law to prevent the new Austin law from taking effect; one legislator has already proposed it.

PSL Fragmentation: Cook County, IL

The 2017 award for the patchiest paid sick leave patchwork goes to Cook County, IL. Before the county enacted its ordinance in 2016, the state attorney announced that the county did not have authority to enact such an ordinance and that if a municipal law conflicted with the county ordinance, the municipal law would prevail. Before the ordinance's July 1, 2017, effective date, more than 80% of the county's 132 municipalities used this provision to opt out. The county plans to challenge these opt-outs. No other jurisdiction came close to matching Cook County's fragmented patchwork last year.

Rhode Island's New PSL Law

The Rhode Island Healthy and Safe Families and Workplaces Act has the traditional architecture for a paid sick leave benefit. Effective July 1, 2018, employees of employers with at least 18 employees will accrue one hour of paid sick and safe leave for every 35 hours worked, to a maximum calendar year accrual of 24 hours in 2018, 32 in 2019, and 40 for later years. Among the law's other provisions:

- Employees begin to accrue leave upon hire or July 1, 2018, whichever comes later; employers may require a waiting period of up to 90 days before new employees can use accrued leave.
- Unused accrued time is carried over into the next year, subject to maximum annual use caps.
- Employers can avoid accrual and carryover requirements by buying out unused time at the end of the year and frontloading the next year's allotment.
- Accrued leave may be used for:
  - an employee's own care or to care for a family member with an illness, injury, or health condition or need for preventive medical care;
  - closure of the employee's place of business or an employee's need to care for a child whose school or place of care has been closed due to a public health emergency;
  - care for the employee or family member after being quarantined by health authorities; and
  - time off when the employee or a family member is a victim of domestic violence, sexual assault, or stalking.
- For foreseeable use of leave, employees must give notice and make a reasonable effort to schedule leave at a time "that does not unduly disrupt" the employer's operation.
- An employer requiring notice to use leave for an unforeseeable need for leave must give employees written notice procedures.
- Employers whose existing policies provide shelter in the law's "safe harbor" are excused from complying with some of the law's procedural requirements.

The Rhode Island law has the most comprehensive provisions concerning abuse of paid sick leave of any such law nationwide. Among its provisions:

"The Rhode Island paid sick leave law has the most comprehensive provisions concerning abuse of any PSL law nationwide."

- Leave cannot be used as an excuse to be late for work without an authorized purpose.
- If an employee is engaged in leave fraud or abuse, the employer may discipline the employee, "up to and including termination of employment...."
- If an employee has "a clear pattern" of taking leave before or after a weekend, vacation, or holiday, an employer may discipline the employee for misuse unless the employee provides reasonable documentation of an authorized purpose for the leave.

PSL Litigation Trends

Also in 2017, some important and much-watched lawsuits were settled:

- Courts rejected challenges by a cadre of business interests to the Arizona and Washington voter-enacted ordinances.
- The Minnesota Supreme Court let stand an appellate court's decision that the Minneapolis ordinance applies only to businesses within the city's geographic boundaries.
- Nine Oregon counties, as employers, had challenged their need to comply with the state's Paid Sick Leave law. A court held that the law was an "unfunded mandate" and in a settlement excused three counties from complying because they established that they would need to

PSL Laws continued on p. 47

COLUMN

Work/Life Squeeze:
FMLA Caregiver Protections

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Beware of Traps in Employee Caregiver Leaves

Each type of employee-as-caregiver leave contains complexities that may trap the unwary employer, so it is imperative to understand the scope of these caregiver protections.

Bonding. Under the Family and Medical Leave Act (FMLA), fathers and other nonbirth parents have bonding-time rights equal to that of the birth mother. Trying to dissuade a father from taking bonding leave or outright denying such leave due to stereotypes about fatherhood or for any other reason can constitute interference with FMLA rights.

Under the FMLA and in most states, bonding leave applies equally to adoption placement and foster care, including time for necessary appointments and proceedings.

Parents are allowed to select the dates for bonding leave. Pressure from an employer to influence the timing of the leave could constitute interference. The FMLA allows an employer to deny intermittent bonding, but some state laws authorize intermittent bonding leave, such as California (two-week or longer increments, plus at least two incidents of shorter intermittent bonding) and New York (intermittent bonding in full-day increments).

Leave for pregnancy or birth. A pregnant woman's spouse (but not a non-spouse parent or domestic partner) is entitled to FMLA leave if the spouse is needed to care for the mother during her prenatal care or if the mother is incapacitated by the pregnancy. An expectant mother may take FMLA leave before birth for incapacity due to pregnancy (such as morning sickness), for prenatal care, and for her own serious health condition following birth.

Care for a servicemember with a serious illness or injury. Certain special FMLA rules apply only to military caregiver leave:

- Leave can be up to 26 weeks in a 12-month period;
- an employer may not request a second or third opinion unless the original certification is provided by a nonmilitary-affiliated healthcare provider; and
- there is no age limit for a servicemember son or daughter needing care.

FMLA caregiver leave for both a family member and an ill or injured service member can include medical needs and care, and transportation to medical appointments, as well as psychological support for a hospitalized family member or servicemember needing companionship.

An employer cannot deny the leave because other family members are available to provide care, nor dictate when to take the leave, unless the time is for a medical appointment or treatment that can be flexible. Intermittent leave is available to care for a family or servicemember when the health condition itself is intermittent or when the employee is only needed intermittently because other care is normally available or is shared with another person.

FMLA interference claims can easily result from employer actions, such as:

- denial of a covered leave request by an eligible employee;
- failure to provide required notices and communications;
- failure to notify an employee that leave will be counted as FMLA, if the employee shows prejudice; or
- discouraging an employee from exercising FMLA rights, such as making frequent phone calls about their return to work or harassment for intermittent time to care for a family member.

FMLA retaliation claims involve an adverse employment action such as termination, refusal to reinstate after leave, demotion, or a salary cut. Evidence that the adverse action was likely due to retaliation for taking a leave include close proximity in time to request for or use of FMLA leave, negative comments by supervisors, or a false reason given for the adverse action.

Most employers are competent in the basics of leave management; legal action is more likely to result from the detail points noted above.

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Early RTW Can Help Control Healthcare Costs

Healthcare is by far the largest benefit expense, projected to grow more than 5% per year through 2024 at least.[1] To mitigate this trend, employers are deploying a variety of strategies with mixed results and, according to research, sometimes adverse consequences.[2] Scientific studies point to appropriate, early return to work (RTW) to help mitigate healthcare costs.

How well are current healthcare cost control strategies working? Nearly 66% of employers offer high-deductible health plans, higher premiums, or other measures to transfer costs to employees. This has led to at least a 200% increase in out-of-pocket expenses for workers over the last 10 years.[3] To save money, more than 1 in 5 adults with health insurance are skipping doctors' appointments or tests, or not taking prescribed medications. Short-term cost savings may lead to worse health and more long-term expense and disability, especially for workers with chronic illnesses.[4] Workplace wellness is another strategy, but participation rates and long-term effectiveness are disappointing.[5]

Recent studies have shown surprising results: RTW programs can have a significant impact on overall healthcare costs, with additional reductions to indemnity costs. In partnership with academic institutions, Liberty Mutual conducted research on the impact of early RTW on medical costs. In one study, 140 volunteering employees with back pain who were at high risk for disability were identified early on. They were randomly placed into two groups, with both groups receiving the usual medical care. But in the intervention group, both the workers and their supervisors also received problem-solving and RTW training. Overall, the intervention group had 72% less lost time.[5]

But the impact on medical care was notable, too. The intervention group had 70% less healthcare costs, with no negative impact on disability recurrence or future healthcare visits. These results should not be surprising. Work can be therapeutic, promoting recovery and rehabilitation, and can shift the focus from pain to becoming more active.

What's needed to implement early RTW programs to help address healthcare and other costs? First, identify opportunities to improve RTW outcomes through scientifically proven strategies of early outreach and proactive, supportive employee communication before a work absence occurs. If an employee cannot return to full duty, evaluate the job and start to discuss potential modifications or temporary transitional employment options. Early referral to case management is key.

Getting RTW-focused medical care at the right time is important, too. Employees in high-deductible health plans may avoid care needed to facilitate RTW to gain short-term cost savings. Employers may want to target conditions early on where RTW can have the greatest impact, such as musculoskeletal and mental health disorders. They can support early, appropriate treatment by partnering with healthcare providers, plan administrators, and their disability insurer to ensure that healthcare cost containment strategies don't interfere with appropriate access and timely, evidence-based care.

Controlling healthcare costs is challenging, and there is no panacea. Successful employers try several strategies, evaluate effectiveness, and adjust. Early RTW can provide better outcomes for employees and significant savings for employers.

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What You Need to Know About Medical Certifications and Recertifications

For most disability and absence administrative matters, the devil is in the details. Certainly, this is true with respect to the medical certification and recertification process under the Family and Medical Leave Act (FMLA). For this reason, it is advisable to review requirements frequently to ensure regulatory compliance and proper administration.

Employers can require a medical certification when an employee requests time off work due to a serious health condition or a family member's serious health condition, including a spouse, child, or parent.

Qualifying exigencies also entitle employees to up to 12 weeks of unpaid leave during any 12-month period. This condition can be met when a family member of an employee is on active duty in the armed forces or has been notified of an impending call to active duty. Intended to help employees manage family affairs, this type of leave can also require a certification.

When an employee makes a leave request under these circumstances, the organization must indicate whether a certification is required and outline the consequences of not providing the required information. The employer may deny FMLA leave if the employee fails to meet the requirements or does not provide the documentation. Barring extenuating circumstances, the employee has 15 calendar days from the date of the request to provide a complete and sufficient certification and is responsible for paying all related costs.

Once presented with a certification, the employer has several courses of action to consider before granting or denying the leave request. First, the employer can identify any deficiencies in the medical certification and ask the employee to provide corrected information. This request must be presented in writing, and the employee must be allowed seven calendar days to remedy the deficiency.

Second, the employer may contact the healthcare provider to clarify and/or authenticate the certification. If the employer is concerned about whether the information provided on the certification was completed or authorized by the healthcare provider, the organization can provide a copy of the certification and ask for authentication. Clarification entails contacting the healthcare provider for further explanation, such as to understand handwriting or the meaning of a response.

While employee consent is not required for authentication, the employee must agree to the employer's request to contact the healthcare provider for clarification prior to the contact being made. Further, the employer cannot ask for more information than the certification provides, and the employee's supervisor cannot contact the healthcare provider directly.

Third, the employer may require a second medical opinion at the organization's expense if there are concerns about the validity of the certification. The employer can require a third medical opinion (which is final and binding), again at the organization's expense, if the first and second opinions differ.

After using all desired authentication options, the employer must notify the employee in writing if the leave will or will not be FMLA-protected.

Generally, employers will request recertification when the time on the certification form elapses. An employer may request recertification no more often than every 30 days and only in connection with an employee absence. An employer may request recertification in less than 30 days if the employee requests an extension of leave or if circumstances described in the previous certification change significantly. Individual circumstances and state laws can vary.

The challenge of managing medical certifications and recertifications underscores the need for technically accomplished and knowledgeable administrative and benefits professionals who can maintain compliant processes.

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When a Fitness-for-Duty Examination Is the Appropriate Tool

An employer can coordinate a fitness-for-duty (FFD) examination with a qualified healthcare provider if the need is job-related and consistent with business necessity and objective facts,[1] if there are concerns about safety, or if an employee is not fully performing the job duties.

The Equal Employment Opportunity Commission (EEOC) requires an employer to have "reasonable belief" based on "objective evidence" that an employee's work may be impacted by a disability. Concern for an employee's general welfare is not grounds for an FFD exam, and using an FFD exam on accepted workers' compensation claims usually just duplicates an expense already incurred.

An FFD exam would not be used unless an employee's workplace performance or actions have triggered the Americans with Disabilities Act (ADA), and there is concern the actual or perceived medical condition is affecting the employee's ability to fully or safely perform the work assigned. Finally, the employer is only allowed two lines of inquiry:

1) Whether the employee has a disability that substantially limits performance at work, and if so, what the employee's *work restrictions*, functional limitations, or leave needs are

2) The *duration* of said restrictions, limitations, or leave needs

Since FFD exams are expensive, you want to be sure they are needed and there are no alternatives to clarify what the employee may or may not require to perform the job fully and safely. Below are some examples where FFD exams would be recommended and why.

1) Amy's doctor restricted her from "stressful work experiences." What does that include? Until the employer knows, it cannot begin to explore reasonable accommodations.

Recommendation: Place Amy off work during this process as you cannot be sure how to keep her safe at work and ensure a non-stressful experience. To keep the process timely and obtain the clarification needed, first ask her healthcare provider to clarify what "stressful work experiences" are. If the reply is unclear or her provider won't clarify, consider an FFD exam to be able to proceed with making reasonable accommodation decisions.

2) Darin was informed he would be terminated for sleeping on the job. At his termination meeting, Darin brings a medical note indicating he had "a sleep disorder that caused him to fall asleep at work" but is now "completely recovered and will never sleep on the job again." Darin had never told his employer he had a medical condition. The employer has reason to doubt the legitimacy of the note and has a business need to quickly address the claim before termination is implemented.

Recommendation: As frustrating as it is, you are strongly encouraged to pause discipline[2] and start the disability interactive process. You can ask his healthcare provider to review the disciplinary charges to confirm whether they are related to a serious medical condition and whether they can be totally mitigated with reasonable accommodations. Or you can skip his provider and go straight to an FFD exam. Either way, for Darin to be protected from termination, the behaviors/actions must have been caused by a disability and there must be reasonable accommodations to ensure the negative behavior will not occur again. That is a tall order for sleeping on the job. An FFD exam would likely result in useful information to help the organization proceed with making the right choice on discipline.

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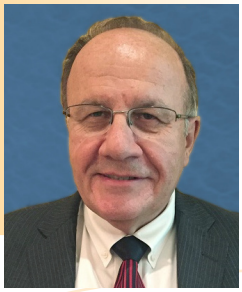

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Equal Treatment for All Parental Bonding Leaves

The Family and Medical Leave Act (FMLA) of 1993 mandated a right to 12 weeks of unpaid, job-protected leave for various reasons, including pregnancy, to help new mothers recover from childbirth, and to facilitate parents bonding with their newborns and newly adopted children.

Even back then the concept was not new; many progressive employers were already providing maternity leaves. And since then, progressive employers have gone beyond the FMLA's minimum requirements and extended paid company parental leaves to both biological and adopted parents. However, we find considerable variability in employer leave policies governing childbirth, bonding, or adoption. In some cases, employers grant fathers less company parental leave than mothers, or adopted parents less parental leave than biological parents.

In this area, issues of discrimination can creep in without well-meaning employers realizing it. While it is not discriminatory for employers to give female employees whatever amount of time or financial benefit they see fit as it relates to pregnancy/maternity-related disability leaves (even if these leaves are richer than other disabilities), it is discriminatory for employers to give different levels of benefits for employees to bond with/care for new children.

We've been seeing some employer leave policies that are clearly discriminatory in that they don't provide all parents with the same benefit period/pay in order to bond with/care for a new child. For example, some provide less leave for adoptive parents than birth parents. Some combine pregnancy-related leaves with bonding time with the result that mothers get more time off than fathers for the latter leave. Sometimes employers take the position that males receive a shorter leave duration as the presumed secondary caregiver. Moreover, some use primary and secondary caregiver designations without clear distinctions for who is considered a primary or secondary caregiver. We believe a primary/secondary caregiver designation is not in itself discriminatory. But without clear parameters the distinction may be applied arbitrarily and with the outdated presumption that mothers are always the primary caregiver and fathers are always secondary.

The legal trend line (federal and state regulatory and case law) is to mandate that ALL parents get the same amount of leave to bond with/care for new children. If a company leave policy treats some parents differently in this area, it's likely to be considered discriminatory by the courts. If you have been administering a company leave where leave time differs by parent class (mothers vs. fathers or biological vs. adoptive), the chances are that none of your employees have challenged the issue in court or lodged a complaint with a government agency. . . ***yet.***

Moreover, it's not only unhappy fathers or adoptive parents working for you who may decide to take you to court. The Equal Employment Opportunity Commission (EEOC) is litigating to drive legal precedents in cases where men are paid less parental leave than women, or given less bonding time than women. The phrases "primary caregiver" and "secondary caregiver" in a corporate employment policy are red flags indicating it's time to review the policy for potential compliance issues. Other federal and state agencies may also have jurisdiction over this area, making the litigation minefield even more complex for employers.

The bottom line is that if a leave policy doesn't provide the same amount of leave to all parents as noted above, then it's likely to be discriminatory. Periodic review of company leave policies for compliance can avoid unnecessary challenges. Forewarned is forearmed.

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Training Is the Key to Compliance

As disability management and human resources (HR) professionals, we are aware of our organization's obligations under the Americans with Disabilities Act (ADA) regarding reasonable accommodations. In most organizations, however, line supervisors are often the first to learn of requests for accommodations. How can we ensure legal compliance and best practices if we are out of the loop?

"Training supervisors is the most important thing an organization can do to support compliance and positive outcomes," advises Michael Weinberger, HR Vice President for Mission Rock Residential and formerly Senior HR Business Partner with Ghirardelli Chocolate Company. Weinberger adds, "By the time HR is involved, certain actions may have already been taken." The Job Accommodation Network (JAN) reinforces this in its guide, *Educating the Workforce about the ADA and Accommodations*, noting that "JAN cannot stress this enough. Train management staff on the ADA and accommodations — early and often." Training, whether by an external vendor or in-house HR staff, should be verified by experts as fully accurate based on current case law.

Supervisors must be aware of the "triggers" to begin an interactive process with employees who may need an accommodation. Even if an employee does not request an accommodation, an employer learning that an employee has a condition impacting the ability to do their job should treat this as a request until a determination can be made. Supervisors must be trained on who is involved in the interactive process, what information can be shared, and how decisions are made so they can appropriately respond to requests.

"It is also important to make sure HR staff is trained to recognize situations that are flags for further inquiry, such as a supervisor alerting HR to an employee's termination," says Weinberger. "When digging further, you may learn the supervisor is taking that action because they feel they cannot accommodate someone — and there has not yet been any interactive process." At Mission Rock, Weinberger ensures that a regional manager is trained to be the point person for these issues at their various locations, and there are regular reminders about obligations under the ADA on annual meeting agendas.

Another best practice is to provide opportunities for supervisors to meet with HR prior to an initial interactive process meeting with employees. This is not to make decisions about the outcome of the process but to further educate supervisors on what is and is not required under the ADA and coach them on their role in the process. "This 'pre-meeting' is a safe environment for the supervisor to ask questions and understand what the expectations are. When the supervisor realizes that the goal is finding a balance between supporting a valued employee and still meeting operational needs, they are much more likely to be on board," says Weinberger.

Remember also to train employees on their rights and your policies for accommodating disabled employees. As JAN points out, "Everyone in the workforce can benefit from having some level of knowledge about the ADA," and this "can benefit businesses by creating a more knowledgeable and inclusive workforce, reducing the likelihood of discrimination." Include information about reasonable accommodations in your employee handbooks and orientations. Weinberger goes one step further: "We have employees sign off on our Reasonable Accommodation Policy as a part of the handbook so we ensure they are aware of their rights. In this way, they can also alert HR if they have concerns."

Taking steps to ensure HR, supervisors, and employees are all aware of the obligations under the ADA will go a long way in supporting both compliance and positive outcomes.

COLUMN

Riding the Demographic Wave

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Boom and Burst: The Baby Boomer Generation Bubble and Productive Aging

The largest generation in our country's history is quickly approaching retirement age. While many Baby Boomers have already retired — the oldest turn age 72 this year — 19% of people age 65 or older were working at least part-time in the second quarter of 2017. This is the highest rate since the modern retirement safety net began functioning in the late 1960s.[1]

Boomers have their reasons to continue working: many cannot afford to retire, and many have tied their identity to their work. But the aging workforce will be with us even after most Boomers have retired, due to key demographic trends.

U.S. population growth is slow, labor force participation rates are decreasing, and Generation X will soon start passing age 55. As a result, employees age 55 and older will increase from 21.7% of the workforce in 2014 to a projected 25% in 2024.[2] The median age of the labor force is projected to reach 42.3 years old in 2026, the highest ever recorded.[3] In other words, the challenge of maintaining productivity is here to stay.

As a result, employers face a key disability and productivity issue: older employees take longer to recover from a disability event (8 to 18 days longer than employees under age 40), which can add cost to an employer's disability program and to virtually every other health and welfare program an employer offers.[4]

Employers need older workers to remain healthy and productive because they are working longer and there are not enough younger workers to fill the talent pipeline. To help meet this challenge, employers should develop and implement a productive aging program.

Central to a productive aging program is the recognition that as employees age, they tend to modify how they perform their work. During a recent study, Boomers identified specific ways employers can help them remain productive as they age. The findings were eye-opening and surprisingly easy to implement:

- Create a flexible work environment that allows employees to spend time with family and attend medical appointments.
- Educate employees about retirement and financial planning to improve financial wellness and reduce monetary concerns that may interfere with their ability to work.
- Train managers on how to support self-modification activities. The supervisor relationship is the key to employee engagement.
- Allow more time to complete tasks; for example, teachers may need more planning time.
- Consider the needs of older employees and how to balance the needs and contributions of all generations.
- Provide employees access to ergonomic education and equipment.
- Leverage employees' skills and experience, and allow them to transition out of strenuous physical tasks as they approach retirement.
- Create an environment that supports work/life balance. This will benefit all generations.[5]

Boomers are going to keep working past normal retirement age, and given the demographic trends, employers may need subsequent generations to do the same. Helping Boomers and all workers remain healthy and productive is a critical imperative for employers.

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The Intersection of the FMLA and the ADA

By now, you may be an expert on the Family and Medical Leave Act (FMLA) and its many requirements. But what about the Americans with Disabilities Act (ADA) and when it overlaps with the FMLA? It's important to know where these laws differ and when they intersect in order to fine-tune your ADA best practices.

While the FMLA provides job-protected leave, the ADA is an antidiscrimination policy that was not specifically created to provide leave. Whereas the FMLA applies to employers with at least 50 employees within a 75-mile radius, the ADA applies to employers with as few as 15 employees with no geographical constraints. The FMLA also grants time to care for the serious health conditions of qualifying family members, whereas the ADA does not.

Under the ADA, an employer must provide reasonable accommodation to employees to allow them to perform the essential functions of their jobs, unless this would cause "undue hardship" to the employer. Many employers became aware of the overlap of the FMLA and ADA following court decisions that leave is appropriate as a reasonable accommodation.

The scope of this practice is being challenged due to *Severson v. Heartland Woodcraft, Inc.* (Sept. 20, 2017). The 7th Circuit Court of Appeals found that a long-term leave of absence is not a reasonable accommodation because "the ADA is an antidiscrimination statute, not a medical leave entitlement." The court held that "reasonable accommodation is expressly limited to those measures that will enable an employee to work."[1] *Because this ruling applies only to the 7th Circuit, we recommend employers err on the side of caution until the Supreme Court reviews this decision or other circuits make similar rulings.*

Many FMLA serious health conditions also meet the ADA's broad definition of disability. Once employees exhaust their FMLA entitlement for their own serious health condition, leave as a reasonable accommodation should be evaluated, guided by best practices.[2]

When an employee requests time off, if the reason for leave *could* be related to disability, this request may involve both an ADA reasonable accommodation and FMLA leave.[3] Requiring and processing FMLA certification is a necessary start but don't stop there. Should you also suspect ADA issues, give those a separate approval process with its own set of requirements to determine the nature of the disability and decide if the employee is entitled to a reasonable accommodation.[3]

Employers can offer reasonable accommodations that do not involve leave as long as they are effective.[3] Examples of non-leave accommodations include modification of the workplace, job restructuring, reassignment, and improving workplace accessibility.[4]

It's a best practice to offer accommodations that encourage employees to return to work (RTW) in a safe and healthy manner. One study found that an effective RTW program reduced the length of absence of injured employees by about 3.6 weeks.[5] Effective accommodations ensure your employees stay engaged in the workforce and help maintain productivity.

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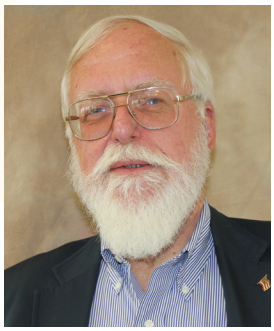

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Data Exchange to Align the FMLA with WC

Keeping the Family and Medical Leave Act (FMLA) in synch with workers' compensation (WC) indemnity claims has been a challenge since the inception of the FMLA. New state and federal rules now make it more important than ever for employers to align the administration of these benefits. A simple data feed from the WC carrier, internal WC claims operation, or third-party administrator (TPA) can make this task much simpler and keep the employer in compliance. Here is what should be included in this data file and how to deploy it efficiently.

• *One-way process:* For purposes of benefit coordination, our organization treats WC as the "senior" benefit because employer obligations in handling on-the-job injuries are so extensive and detailed. We use information developed in the WC claims process for purposes of leave administration, but no reverse flow is required since WC benefits are not predicated on FMLA status.

• *Just the facts:* A WC-to-FMLA data feed is not complex, and the same feed can be used to coordinate short-term disability (STD) benefits, since many employee incidents may intersect all three coverages. All you need are:

– The demographic header: The unique employee identifier to match all events concerning this individual

– Claim header: The WC claim number and the adjuster contact information (invaluable, especially for complex events requiring active coordination)

– Key dates: The date of the injury, date reported/first notice of loss, indemnity benefit inception date, and expected return-to-work (RTW) date, if available

– Claim status: Where is the claim in the WC process as of the date of the feed: reported/no determination, reported/pended for investigation, in benefit, or closed

– Indemnity benefit type: Temporary total disability, temporary partial disability, permanent partial disability, or permanent total disability; the first two are most common in FMLA/STD coordination

– Indemnity benefit paid: The weekly lost time benefit paid to the employee; needed only when an STD offset may be involved

• *Feed frequency:* For most programs, one file per week is adequate, but large employers may need higher frequency.

Using this type of data feed for the FMLA is simple and can eliminate work duplication. If the employee's injury has been accepted as payable under WC and the benefit process has started, a separate healthcare provider's statement in the FMLA file is usually not needed. An exception can arise when the WC adjuster cannot determine a likely RTW date. Also, sometimes FMLA leave is for a different reason than the WC claim, requiring a separate FMLA certification process with appropriate notifications to the claimant.

Other issues arise when the employee's indemnity status changes from *temporary* total disability to *permanent* total or permanent *partial* disability while the person is still within the FMLA job-protection window. In such cases, the employee will have returned to some form of part-time, accommodated, or reduced hours work. Because the time not worked may come under intermittent FMLA leave, job protection remains in place for those periods; adverse employment actions in relation to the WC claim must first be reviewed for FMLA compliance.

One of the most important aspects of coordinating WC and non-WC benefits involves the Americans with Disabilities Act (ADA). The WC adjuster contact information becomes very important because people need to talk to one another. Facilitating return to work for WC through workplace or task modifications is also governed by the ADA's reasonable accommodation requirements. Unfortunately, the federal rules for accommodation are not incorporated in state WC regulations. It is vital for human resources and the carrier or TPA to confer on complex accommodations to avoid unintentional — but actionable — errors in making compliant accommodations.

Coordinating WC with the FMLA and the ADA has several moving parts to consider. Every employer needs to have the proper communication channels in place internally or with the carrier or TPA, or potentially costly mistakes may happen.

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7th Annual Employer Leave Management Survey Results Unveiled

The 2017 DMEC Employer Leave Management Survey, the seventh annual survey in this series, highlights employers' response to expanded compliance mandates, including new state and local paid sick leave laws.

Approximately one-third of the 1,203 employers who participated in the survey are subject to the fragmented patchwork of these new laws, now in more than 40 jurisdictions including nine states.

A Feb. 8 webinar provided a preview of the survey results; the full survey white paper can be found at www.dmec.org/leave-management-survey.

Employers that have the budget to outsource leave management are bundling their programs with external vendors and feeling satisfied with their arrangements. Companies that have the bandwidth to manage leave internally are increasingly leveraging technology to assist them.

Continuing challenges exist in managing intermittent leave and the Americans with Disabilities Act (ADA), and training and relying on managers and supervisors for leave identification and enforcement. Employer program development efforts most often focus on: how best to offer paid leave, further integrating processes and systems, developing total absence management approaches, and creating reports to help identify trends and track outcomes.

Many employers are more generous with leaves than legally required in order to ensure compliance; at least 33% of survey participants and up to 59% provide more leave depending on employer size. During the live webinar discussion, one attendee asked about the downsides of this practice. Spring Group Principal Karen English mentioned two issues: increased rates of employee absence, and fostering an entitlement mentality. DMEC CEO Terri Rhodes added, "be consistent in your generosity across the board" to reduce litigation risks.

Survey Key Trends

FMLA Outsourcing. As employer size increases, so does Family and Medical Leave Act (FMLA) outsourcing. Employers with call center populations are twice as likely (36%) to outsource. The number of work sites is another key factor: 11% of employers with five or fewer locations outsource, compared to 44% with more than 50 locations.

Bundled outsourcing practices differ by employer size. Employers with more than 1,000 employees are more likely to outsource short-term disability, long-term disability, and statutory disability to the same vendor as leave management. Employers with fewer then 1,000 employees more commonly outsource workers' compensation, medical, employer assistance programs, and wellness to the same leave vendor.

Insourcing. When employers insource leave management programs, they most often acquire leave management technology to run standard reports (93%), followed by eligibility determination (71%). The majority (77%) of employers, regardless of size, are satisfied with the technology their organization uses for leave management.

Co-sourcing. Shared management cosourcing between employers and vendors most often involves the FMLA and the ADA, followed by personal leaves (particularly payment-related), medical review and certification, and other administrative tasks. Co-sourcing is more common for 1,000-4,999 and 20,000+ size employers. As employer size increases (starting at 1,000), FMLA co-sourcing tends to decrease and ADA co-sourcing tends to increase.

Satisfaction. Compared to 2016, employers are more satisfied with their

Survey Results continued on p. 44

Tribute to DMEC Supporters John Garner and Pam Porter

At the 2018 DMEC Annual Conference in Austin, we will pay tribute to John Garner and Pam Porter, two leaders in integrated absence management (IAM), who passed away just a few days apart in early 2018.

Each made substantial contributions to the IAM profession, and were honored by DMEC for their work with the Partnership Award.

John served as the Government and Legislative advisor to DMEC for two decades, producing Legislative Updates for the DMEC website and *@Work* magazine. John also spoke regularly at DMEC chapter events and conferences, and was an active volunteer during DMEC's early years.

Pam was a stalwart on the board for the San Jose chapter for nearly two decades, serving as both President and Vice President. Pam was also a loyal conference volunteer and contributed to DMEC's publications and programs over the years.

Both had important roles in the industry for major employers — John with Towers Perrin, Prudential, and Bolton & Co., and Pam with Matrix Absence Management and LSI Logic — and as independent consultants.

John Garner

Pam Porter

"We are all saddened by these two significant losses," said DMEC Chairwoman Marcia Carruthers. "John was a strong and quiet DMEC supporter for almost 25 years. His tireless dedication kept us informed in the *Bulletin* and *@Work* magazine. He was constantly promoting DMEC's mission which was invaluable. Pam worked quietly in the background since the inception of the San Jose chapter and served as a friendly greeter at the conference registration desk. John and Pam will be greatly missed both personally and professionally."

Many people call DMEC a "family" as well as a professional association, due to networking and friendships that happen at conferences and in chapters. The DMEC family would like to thank John, Pam, and many others who have put their heart and soul into furthering DMEC's mission as well as the IAM profession.

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vendor's ability to grant access to self-service information and reporting, provide data feeds to/from various systems, and to identify fraudulent activity. Satisfaction has decreased in vendors' ability to keep employers apprised of changing regulations and requirements, which is not surprising given the constant activity around leave legislation, but poses an opportunity for improvement by the vendor community.

Paid Sick Leave. Employers subject to paid sick leave (PSL) laws more commonly structure PSL as part of their paid time off policy. Paid sick leave is more often structured as a separate policy for employers with 100-999 employees.

Paid Parental and Family Leave. For family care leave, 48% of employers offer paid parental leave only, 26% offer paid family care leave only, and 25% offer both. Among employers with 20,000+ employees, 54% offer paid family care leave, compared to 21% for companies with fewer than 1,000 employees.

The 2017 survey participation of 1,203 employers was the largest ever, representing all organizational sizes, U.S. states, and a broad range of industries. Members can access the webinar recording at www.dmec.org/leave-management-survey.

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CM #8 New York Paid Family Leave

assessed as fully prepared, while one-third were "barely prepared." Educating employees about the new benefit was the biggest challenge: 73.7% had yet to educate and prepare employees around PFL, and more than two-thirds (68.4%) still had to create written guidance for employees. The NY PFL benefit is only one of the new state and local laws creating a fragmented patchwork of compliance for employers to navigate. To learn more about the survey and access NY PFL readiness tips, visit http://pfl.shelterpoint.com/blog/pfl-checklist-employer. To learn more about NY PFL benefits and administration, visit http://dmec.org/2018/02/14/new-york-paid-family-leave-one-month-check/

CM #9 Austin Passes Paid Sick Leave

The new paid sick leave (PSL) ordinance passed in Austin, TX, on Feb. 16 highlights the fragmented compliance patchwork that employers must navigate.

In elections nationwide, a jurisdiction's 'blue' political status increases the chances that a PSL will pass. Travis County, of which Austin is the seat, is a deep blue enclave in the red sea of Texas. Two-thirds of Travis County voters cast ballots for Hillary Clinton in the 2016 election.

Now that Austin has adopted PSL, will Texas pass a preemption law banning political subdivisions from enacting local PSL laws, to invalidate the Austin ordinance? A state representative from Austin reportedly has already stated his intent to pursue that strategy.

Employers not only must comply with laws passed at the municipal or county level, but may also have to navigate the choppy waters of a state vs. local conflict over some of these PSL laws. The Pennsylvania Supreme Court decided recently to hear an appeal of a decision to invalidate Pittsburgh's PSL law of 2015 because Pittsburgh allegedly did not have the authority to enact the law.

The new Austin PSL ordinance takes effect Oct. 1, 2018 for employers with more than five employees. For smaller employers, it is effective Oct. 1, 2020.

It requires private sector employers with 15 or fewer employees to provide employees who work at least 80 hours within the city in a calendar year to accrue one hour of PSL for every 30 hours worked, up to 48 hours annually. The accrual cap for employers with more than 15 employees is 64 hours annually. To learn more, visit http://dmec.org/2018/02/16/austin-plants-paid-sick-leave-flag-in-the-south/

School-Related Parental Leave

State	Leave Provisions
California	Up to 40 hours per year, but no more than 8 hours per month, to participate in children's educational activities
Colorado	Employees who are the parents or legal guardians of children in grades K-12 can take up to 6 hours of unpaid leave in any month, up to a total of 18 hours in any school year, to attend school-related activities or parent-teacher conferences
District of Columbia	Up to 24 hours per year to participate in children's educational activities
Illinois	Up to 8 hours per school year, but no more than 4 hours on any day, to attend a child's school activities, and only when no other type of employee leave is available
Louisiana	Up to 16 hours per year at the employer's discretion to participate in children's educational activities. Allows an employee to use any type of accrued leave to participate in his or her children's educational activities.
Massachusetts	Up to 24 hours per year to participate in children's educational activities or accompany a child, spouse, or elderly relative to routine medical appointments
Minnesota	Up to 16 hours per year to participate in children's educational activities
Nevada	Makes it unlawful to terminate an employee for attending school conferences or for receiving notification of a child's emergency at work
North Carolina	Up to 4 hours per year to participate in children's educational activities
Rhode Island	Up to 10 hours per year to participate in children's educational activities
Vermont	Provides an additional 24 hours in 12 months to attend to the routine or emergency medical needs of a child, spouse, parent, or parent-in-law, or to participate in children's educational activities. Limits this leave to no more than 4 hours in any 30-day period.

Source: National Conference of State Legislatures, 2016 and DMEC, 2018.

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spend more than one one-hundredth of 1% of their budget on compliance.

Looking ahead to 2018, a paid sick leave bill was introduced in Nebraska's unicameral legislature on Jan. 4; similar moves are projected to happen in many more states. The cities of Albuquerque, NM; Duluth, MN; and Portland, ME, have paid sick leave ordinances on the agenda to consider in 2018 as well. On the litigation docket, the Pennsylvania Supreme Court decided recently to hear an appeal of a decision to invalidate Pittsburgh's PSL law of 2015 because Pittsburgh allegedly did not have the authority to enact the law.

All part of the rich paid sick leave pageant!

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