



# Forum, 2016

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## Overcoming FMLA and ADA Challenges:

A Case Study in Absenteeism Improvement

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# About the Speakers

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## **Matt Morris**

Responsible for compliance as VP of FMLASource<sup>®</sup>, a ComPsych<sup>®</sup> program

Employment attorney by background

13 years of experience in FMLA administration

Frequent speaker on FMLA, state leaves, ADA

Invited by DOL for FMLA roundtable; authored response to proposed FMLA changes—cited many times by the DOL in final rule

## **Marjory D. Robertson**

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

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

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

Frequent speaker at employment law training sessions

# Agenda

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## Background

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

How Employers Address These Issues

The Employer's Story

## Current and Challenging Issues

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

For each, we'll address:

- The effect on employers – Sun Life story
- Solutions
- Recent changes

## Wrap Up and Questions

# What's the Big Deal?

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

## FMLA Challenges

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

## ADA Challenges

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

# How Have Employers Solved for This?

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

About **40% of employers** expect the importance of outsourcing FMLA and ADA services to increase.

***IS ADA THE NEW FMLA?** Insights on Outsourcing Employer Compliance Support Services  
(Prudential, 2015)*

# The Employer's Challenge

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Over the last year, the four **biggest challenges** for our clients moving to outsourcing (especially for the first time) have been:

1. **Compliance** – understanding compliance obligations across several sites with ever-changing federal and state obligations.
2. **Oversight** – decentralization created lack of consistency, control, and expertise from decision-makers.
3. **Intermittent Misuse** – challenges from particular pockets of employees misusing their intermittent leave.
4. **ADA Concerns and Leave** – lack of inclusion of ADA within the leave process.

# Challenge 1:

## Compliance

### Complexity

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

### Change

- *Federal level*
- Transformational case law – 2 cases per week on average



### Change (continued)

- *State Level*
- Example: Over 10 different state leaves in last 2 years on pregnancy disability accommodations
- Lots of state bills and momentum on “paid FMLA”
  - Active bills in Connecticut, District of Columbia, and now Massachusetts
  - Most pay 100% for 12 weeks up to \$1000 (then the bills vary)

# Employer Solution

- Have experts monitor, analyze and embed changes
- Create a centralized approach
- Plus, for employers that grow – scalable/replicable

# Challenge 2:

## Oversight

# Oversight has become a bigger issue for employers.

### *Why?*

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

**40%** of employers have trouble making leave decisions. **47%** challenged with keeping accurate attendance. *Guardian Life Survey 2015*

**44%** of employers said training supervisors on the FMLA is “extremely difficult.” *DMEC Study, 2015*

# Challenges in Law

**In the last 12 months, a significant rise in cases where issues are caused by overreliance on or interference by managers or HR**

## **Situations where managers/HR . . .**

- Involvement tainted termination decision
- Knew of leave, but didn't report to proper channels
- Made improper comments
- Had enough information to know there was a medical condition, yet did nothing
- Improperly contacted employees during the leave

# Challenges in Law – Examples

## Situations where managers/HR . . .

### Involvement tainted termination decision

- Manager knew about employee's back/neck injury and had not fired employees who made similar safety violation. *Smothers v. Solvay Chemicals, Inc.* (10th Cir. 2014)
- Manager became irate; told the employee she couldn't take leave and needed a doctor's note. Employer liable even when the manager immediately retracted demand and apologized. *Gordon v. U.S. Capitol Police*, (D.C. Cir. 2015)

### Knew, but didn't report to proper channels

- Manager got texts but didn't report up. *Hudson v. Tyson Fresh Meats, Inc.*, (8th Cir. 2015)
- Manager knew and directed the employee to proper FMLA channels but didn't follow up and fired the employee. *Preddie v. Bartholomew Consol. Sch. Corp.* (7<sup>th</sup> Cir. 2015)

# Challenges in Law – Examples

## Situations where managers/HR . . .

### Made improper comments

#### Not appropriate

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

#### Ok

- She “put us in this position”. *Henderson v. Chrysler Group* (6<sup>th</sup> Cir. 2015)

# Challenges in Law – Examples

## Situations where managers/HR . . .

Had enough information to know there was a medical condition, yet did nothing

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



# Challenges in Law – Examples

## Situations where managers/HR . . .

### Improperly contacted employees during the leave

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

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

But, in two other cases, the court said the contact was ok

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

# Employer Experience

## Some questions

**Why all the recent cases involving actions of managers and HR?**

**How do you solve for this?**

- Refine the roles and workflow as it relates to managers and HR

**How should these roles engage in the leave process?**

- HR – employee relations matters; interactive process
- Manager – staffing, attendance, etc.

**How does an outsourced model affect this?**

# Challenge 3:

## Intermittent Misuse

Every employer in every survey every time says their number one issue is **unplanned intermittent leave**. (Of course it is)

### ***Often***

- Particular challenge in one location
- Probable cause of issue:
  - Highly scheduled workforce
  - Viral intermittent use (common among one location)

***Unplanned absences . . . add to workload (69%), increase stress (61%), disrupt work of others (59%), and hurt employee morale (48%).***

The Total Financial Impact of Employee Absences, SHRM/Kronos (2014)

### ***What's not to like?***

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

# Legal Developments

Recent developments focused more on what an employer ***can't*** do versus what they can.

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

# Legal Developments

## So what *can* an employer do?

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

# Challenge 4:

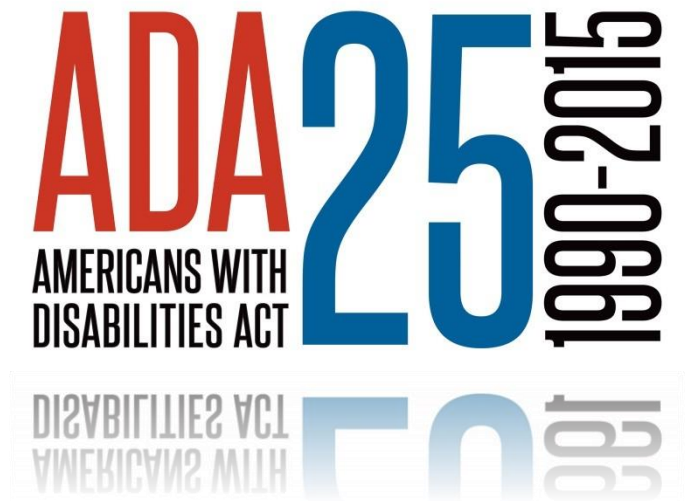
## ADA Leaves



# The Americans with Disabilities Act

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



# Employer Concerns

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

# What are Employers' Obligations?

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- To engage in a “good faith interactive” dialogue or process with the disabled employee
- To evaluate whether or not a reasonable accommodation can help the employee perform the essential function of the job
- Employers must be proactive — engage in the good faith interactive process when the employer has reason to know that an accommodation may be appropriate



# Employers' ADA Challenges

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Many employers still do not have an ADA leave program

For those that do, two big issues:

- **FMLA/ADA Integration.** Two separate programs. ADA requests were appropriately directed to HR . . . but only when affirmatively requested (“I need an ADA accommodation.”)
  - Courts are consistent: an FMLA request is also request for accommodation under the ADA.
- **Expertise.** Not a matter of having HR experts but a challenge keeping up with guidance on ADA.

# FMLA/ADA Integration

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

## Recognize when an FMLA leave could also be ADA

- All the “inflexible” leave cases! Example: Employer denied leave—and did not consider the ADA—to employee because he was “probationary” and didn’t qualify for FMLA or their company leave. *EEOC v. EZFLOW USA* (2015)

## Recognize the opposite – when an ADA leave could also be FMLA

- Employee’s ADA accommodation request for mandatory overtime irrelevant because FMLA would cover the time requested. *Santiago v. Conn. Dept. of Transportation* (D.Conn. 2014)

# What's the Big Deal?

We've been talking about the *Sears* case for years, but the EEOC is still at it. "Inflexible leave" cases still top of their agenda.

### "Inflexible Leave" cases

- *EEOC v. EZFLOW USA*
- *EEOC v. ValleyLife*
- *EEOC v. Pactiv*  
(\$1.7M settlement)
- *EEOC v. BMO Harris*
- *EEOC v. Jewel-Osco*  
(\$482K settlement of consent decree)
- *EEOC v. Children's Hospital & Research Center*
- *EEOC v. Denny's*

### "100% healed" cases

- *EEOC v. Chemical Transportation*
- *EEOC v. Brookdale Senior Living*
- *EEOC v. Neenah Paper*
- *EEOC v. Interstate Distributor Co.*
- *EEOC v. United Parcel Service & UPS v. Department of Fair Employment & Housing*

**Bolded cases from 2015**

# Need for Expertise

Even when HR departments understand the ADA (ADAAAA), so much of the guidance flows from court cases.

**Recent decisions provide guidance on these questions:**

Do **disabilities** include . . .

- Pregnancy-related conditions?
- Temporary conditions?
- Stress caused by a particular manager?

# Need for Expertise

Do **disabilities** include . . .

- Pregnancy-related conditions? **Yes, maybe.**
  - Yes says the EEOC (Enforcement Guidance: Pregnancy Discrimination and Related Issues – 2014)
  - Sorta, says the Supreme Court (*Young v. UPS* said that it's not an ADA disability but should be treated like other like disabling conditions)
  - Many state laws cover leave as a pregnancy accommodation
  
- Temporary conditions? **Yes, maybe.**
  - *Summers v. Altarum Institute* (4th Cir. 2014)



# Need for Expertise

Do **disabilities** include . . .

- Stress caused by a particular manager? **Yes, maybe.**  
Cases are mixed.
  - Not under a particular manager. *Higgins-Williams v Sutter Medical Foundation* (Cal. Ct. App. 2015)
  - Or when can do other jobs. *Adetimehin v. Healix Infusion Therapy, Inc.* (S.D. Tex. 2015)
  - But yes, in some cases, given the breadth of the law. *Palmerini v. Fidelity Brokerage Svcs. LLC*, (D.N.H. 2014)

# Need for Expertise

Even when HR departments understand the ADA (ADAAAA), so much of the guidance flows from court cases

**Recent decisions provide guidance on these questions:**

**Do reasonable accommodations include . . .**

- Telecommuting?
- “Open-ended” leaves?
- Flexible schedules?
- Changing managers?
- Occasional absences for employees who cannot demonstrate regular attendance?

# Need for Expertise

Do **reasonable accommodations** include . . .

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

# Need for Expertise

Do **reasonable accommodations** include . . .

- “Open-ended” leaves? **Generally not.**
  - “Open-ended leave extensions do not constitute reasonable accommodations” *Exchevarra v. AstraZeneca* (D. Puerto Rico 2015)
  
- Flexible Schedules? **Maybe.**
  - Employer cannot cite punctuality as essential function when they had previously allowed employees to use banked time. *McMillan v. City of New York* (2nd Cir. 2013); Also, *Solomon v. Vilsack* (D.C. Cir. 2014)

# Need for Expertise

Do **reasonable accommodations** include . . .

- Changing managers? **Generally not.**
  - Especially where the distress comes from the manager holding the employee to expectations. *Schwarzkopf v. Brunswick Corp.* (D. Minn. 2011); *Tomlinson v. Wiggins* (W.D. Ark. 2013).

# Need for Expertise

Do **reasonable accommodations** include . . .

- Occasional absences for employees who cannot demonstrate regular attendance? **Depends.**
  - Two courts: when erratic attendance affects the employee's essential functions. *Mecca v. Florida Health Services Center* (M.D. FL 2014); *Basden v. Professional Transp.* (7th Cir. 2013)
  - But a 2013 case: although attendance was important, it was not essential. *EEOC v. AT&T Corp.* (S.D. Ind. 2013)

# Thoughts and Takeaways

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- Many ways to solve these employer issues, but first, must know what issues you have. (e.g., ADA leaves)
- Issues you have are likely not only common, but also areas of turbulence within the courts and other guidance
- Keep up with changes in the law
  - **2015:** On average, approximately 2-3 important developments per week
- Train your managers! 😊
- Know whether you have intermittent issues (IBI benchmarking!) and consider what options you have (and *don't* have) to solve for them
- ADA leaves – be sure you're solving for what to do if the employee can't get back to work soon



# Forum, 2016

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Q&A