



# Managing and Preventing FMLA Abuse

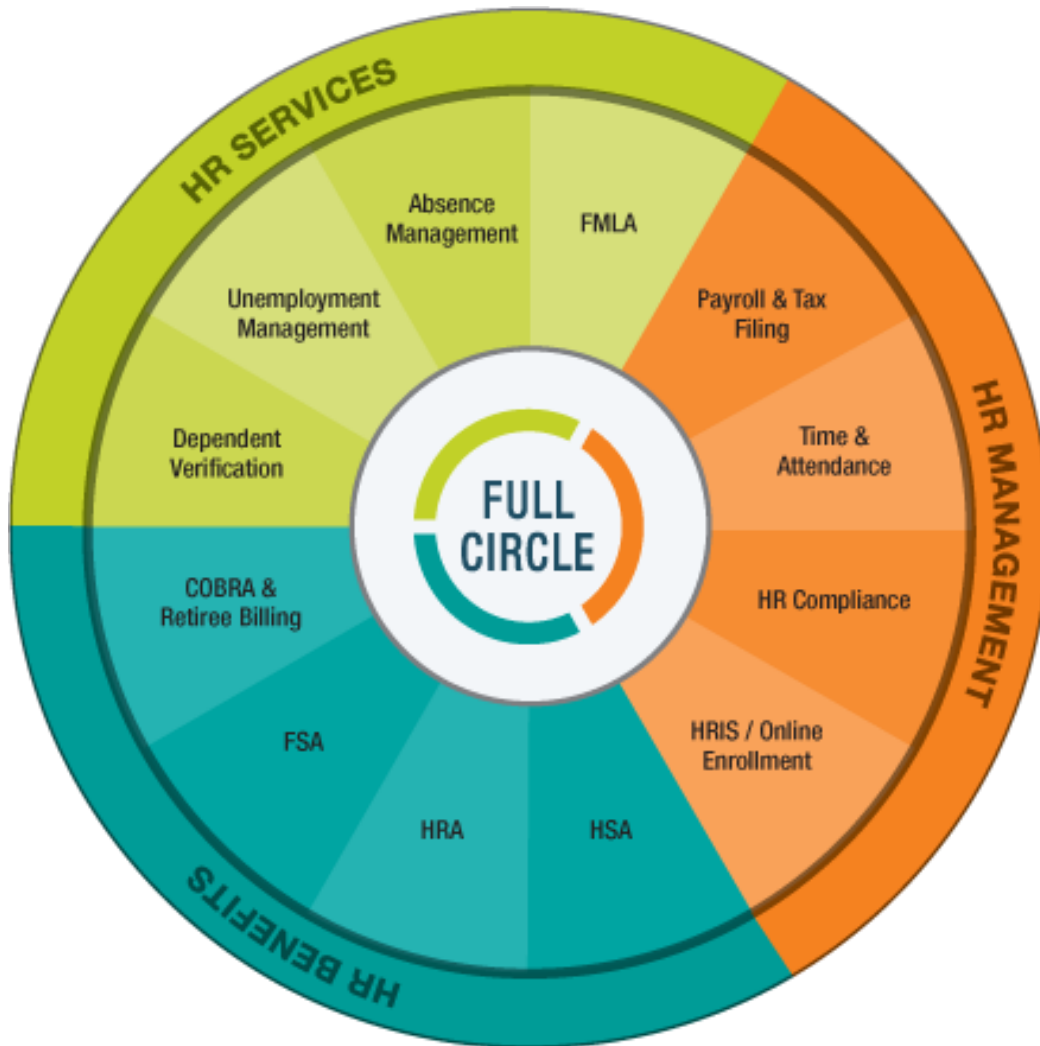
Presented by: Jeff Nowak



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## **Jeff Nowak – Partner & Author of *FMLA Insights***

Jeff Nowak serves as co-chair of Franczek Radelet’s Labor and Employment Practice Group. Named in 2012 one of the “Top 40 Attorneys under 40” in Illinois, Jeff represents private and public sector management clients in all areas of labor and employment law. Jeff is a nationally-recognized leader in the areas of the Family and Medical Leave Act and Americans with Disabilities Act, including counseling employers on compliance with FMLA and ADA regulations, conducting FMLA/ADA audits and training and successfully litigating FMLA and ADA lawsuits. Notably, he serves as author of the well-respected *FMLA Insights* blog ([www.fmlainsights.com](http://www.fmlainsights.com)), which has been named by the *ABA Journal* as one of the top 100 legal blogs for the past three years.

# Agenda



- Overview of FMLA abuse, intermittent leave
- Real-life scenarios
- Top 10 Practical Steps to Identify, Manage and Prevent FMLA Abuse
- Your Questions

# “Chronic” FMLA Headaches



- Where a chronic serious health condition is involved, what drives employers mad?
  - Tracking intermittent FMLA Leave
  - Vague medical certification
  - Employer unsure about legitimacy of leave request
  - Chronic abuse of intermittent FMLA Leave

# Intermittent Leave



- FMLA = block, intermittent, reduced schedule
- Main culprit of FMLA abuse – **Intermittent Leave**
  - Lends itself to abuse
  - Reduced schedule: FMLA leave schedule that reduces employee's usual number of working hours per week/day

# Intermittent Leave



- Employer required to grant intermittent or reduced schedule leave only when such leave is *medically necessary* and the necessity is best accommodated through intermittent leave or reduced schedule
- Examples:
  - Medical appointments
  - Prenatal exams
  - Migraines
  - Restricted work hours (e.g., worker's comp)

# Frannie



- Frannie is one of your project managers
- Suffers from irritable bowel syndrome
  - Certification indicates 2 days/mo; 1 day ea.
  - Past three months:
    - Calls into supervisor’s voicemail to avoid live person; often calls shortly before his shift
    - On some occasions, reports chronic condition; on other occasions, reports that he’s “not feeling well again” or simply “taking an FMLA day”
    - 3x/2x/3x
    - Almost all on M or F



# The Inquisition



- “The Employer may find it necessary to inquire further to determine if the leave is because of a serious health condition . . .”  
29 C.F.R. 825.302(c)
- Fairly broad right to talk directly to employee
- Employer has right to know:
  - what the medical facts are
  - why the employee cannot perform the job
  - time periods involved
  - whether this is recurring, and whether doctor is involved

# Establish a Call-in Policy



- Employee must comply with employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances
- If employee does not follow, FMLA may be delayed or denied
- Importance of call-in policy and following employer's procedural requirements
  - *Banaszak v. Ten Recovery Network.*, 2013 WL 2623882 (6<sup>th</sup> Cir. 2013)
  - *Lanier v. Univ. of Texas Southwestern Medical Cntr.*, 2013 WL 2631316 (5<sup>th</sup> Cir. 2013)

# Recertification



- General Rule:
  - No more often than every 30 days and with an absence
  - If duration specified is longer than 30 days, cannot seek recertification until that period is exhausted
    - Exception: Employer can seek recertification every 6 months, regardless of duration
  - Others:
    - Employee requests an extension
    - Circumstances have changed *significantly*
    - Receive information that casts doubt on the validity
    - Duration/period has expired and absence occurs

# Frequency/Pattern



- Do we have a *significant* change in frequency?

29 CFR § 825.308(c)(2)

- Pattern?

- “. . . the employer may provide the health care provider with a record of the employee’s absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern”
- Use correspondence to your advantage
  - Letter to HCP explaining background: fact pattern, express concern
  - Invite HCP to explain why need for leave occurs on Fri./Mon.
  - Use new certification form for HCP to complete



# ***Social Media...Meet my friend, the FMLA***

# The Social Media Bust



- Frannie: needs to care for mom in Peru
- Needs continuous leave for 6 weeks; provides certification
- Two weeks into Frannie's FMLA leave, one of her co-workers, Molly, tells Director of Employee Relations:
  - Molly is Facebook friends with Frannie
  - She was on Frannie's Facebook page this past week
  - Photos show Frannie with friends traveling in Italy
  - A photo – one of many – was posted last night showing Frannie's location in Rome, Italy

**Here's the photo of her new FB profile pic**  
Frannie is the one in front...



Waaaaahooooo!!

# Honest Belief Defense



- Some courts: job protection can be denied based on an “honest belief/suspicion” that the employee was abusing leave
- In particular, Sixth and Seventh Circuits have adopted this standard

**“Honest belief/suspicion” test (7<sup>th</sup> Cir.):**  
An employer “need not conclusively prove that [the plaintiff] had misused her leave; an honest suspicion will do.”

- Analysis is largely fact-intensive



# Honest Belief Defense



- *Jaszczyszyn v. Advantage Health Physician Network*, 2012 WL 5416616 (6<sup>th</sup> Cir. 2012)
  - “[S]o long as the employer honestly believed in the proffered [lawful] reason given for its employment action, the employee cannot establish pretext **even if the employer’s reason is ultimately found to be mistaken, foolish, trivial, or baseless.**”
- *Lineberry v. Detroit Medical Center*, 2013 WL 438689 (E.D. Mich. 2013)
  - Employee was granted leave for bad back
  - Later, employer uncovered pictures on Facebook: employee drinking; photo of her on sports boat
  - Fired due to dishonesty

# Honest Belief: Best Practices



- Courts look for complete/exhaustive investigation
- Employers **lose** when there is no sense of “due process” or there is a rush to judgment
- What is a complete investigation of the facts?
  - Get complete facts, gather information, mindful of state laws
  - Meet with Frannie, and during meeting:
    - 1) Confirm her request for a continuous leave of absence
    - 2) Confirm the need to care for mom during requested period
    - 3) Confirm she understands how seriously you take fraud
    - 4) Ask if she stayed in Peru during entire time period; inquire whether she left the country
    - 5) Tell her what has been reported; show her Facebook entries
  - Timing of meeting



# 10 Practical Steps to Identify, Manage and Prevent FMLA Abuse

# Before Leave Occurs



1. Put controls in place before FMLA abuse has a chance to infiltrate
  - Establish and enforce reasonable call-in policy and procedures
  - Use script of questions
  - Use Leave of Absence form, submit to HR
  - Personal Certification
  - Require Dr. note for paid sick days

# Before Leave Occurs



## 2. Seek medical certification wherever possible; attach job description

- Initially
- Every leave year
- Every time reason changes
- Request for extension of leave
- Push back on insufficient information
  - Duration? Frequency? Diagnosis? Planned treatment?
  - Intermittent leave medically necessary

# Before Leave Occurs



## 3. Authenticate/clarify certification when the medical certification is inadequate or incomplete

### PARA-MEDICAL FACTS

1. Approximate date condition commenced: August 2006

Probable duration of condition: Five years, 1 month, 3 days, 8 hours and 42 seconds

Mark below as applicable:

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?

No  Yes. If so, dates of admission:

# During FMLA Leave



4. Use second and third opinions where appropriate
5. Recertification!
  - Obtain at first available instance
  - Frequency/duration inconsistent
  - Pattern of suspicious absences
  - Circumstances cast doubt on continuing validity
  - Send letter/attendance record to health care provider
6. Track absence pattern; stay in touch with employee during leave – require check-in

# During and After FMLA Leave



7. Establish policy prohibiting second job; consider surveillance/investigator in egregious cases
8. Address performance issues
  - Don't ignore performance problems
  - If employee has non-FMLA attendance issues, note this on the disciplinary form
9. Establish audit process for employees on intermittent leave



# Before, During and After FMLA Leave



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## "I Got Stuck in the Blood Pressure Machine at the Grocery Store and Couldn't Get Out!": How Employers Deal with the Most Outrageous Excuses for FMLA Leave

By Jeff Nowak on November 7, 2014  
Posted in Abuse of FMLA leave

Don't you hate it when someone glues your windows and doors shut so you cannot make it to work? Hasn't happened to you? According to a recent CareerBuilder survey, this may very well have happened to one of your co-workers the last time he was absent from work.

Last month, CareerBuilder published the 2014 edition of its [annual survey](#) highlighting the most outrageous excuses employees have given when calling in sick. Consider some of these highlights:

- Over the past year, 28% of employees have called in to work sick when they were feeling well, which was down from 32% last year. When asked for a reason, 30% said they simply didn't feel like reporting to work and 29% responded that they wanted the day to kick back and relax.
- Another 21% took the day off to attend a doctor's appointment and 19% wanted to catch up on sleep. Meanwhile, bad weather was enough for 11% of employees to take the day off.

Instead of reporting to their supervisors that they were under the weather and couldn't make to work, employees across the country provided the most colorful excuses in 2014. Here are some of my favorites from CareerBuilder's list:



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### About Jeff Nowak

Jeff Nowak is co-chair of the labor and employment practice at Franczek Radelet, where he represents employers in all aspects of employment law. His clients praise him as a trusted business partner who is acutely aware of their business goals and the impact employment decisions have on their operations. A staunch advocate and effective litigator for his clients, Jeff also isn't afraid to be candid with clients where compliance issues or litigation must be resolved to meet business objectives. He is a nationally-recognized leader in the FMLA and ADA, and his passion for the FMLA shows through on this blog.

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# Questions



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# Contact the Presenter



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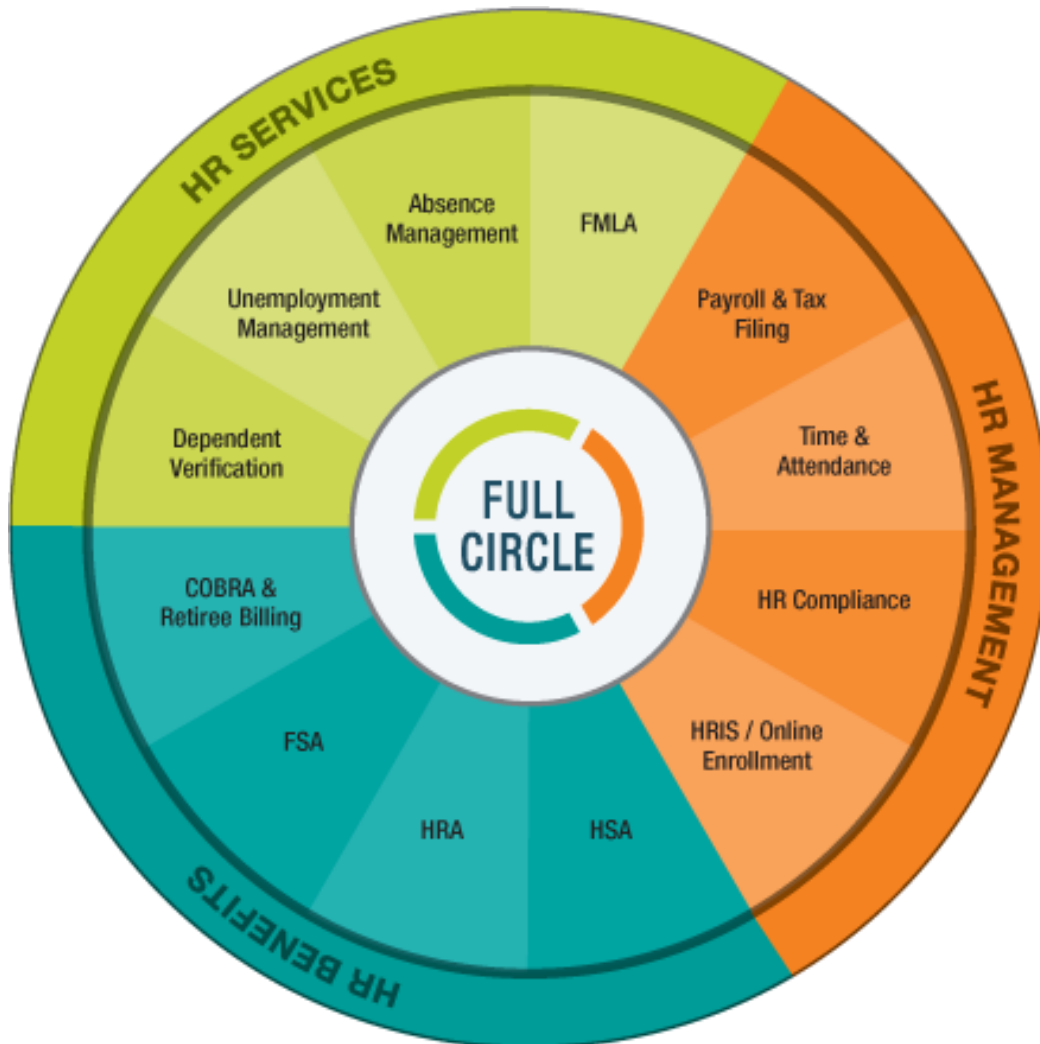
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