



Effectively Managing Difficult FMLA and ADA Issues

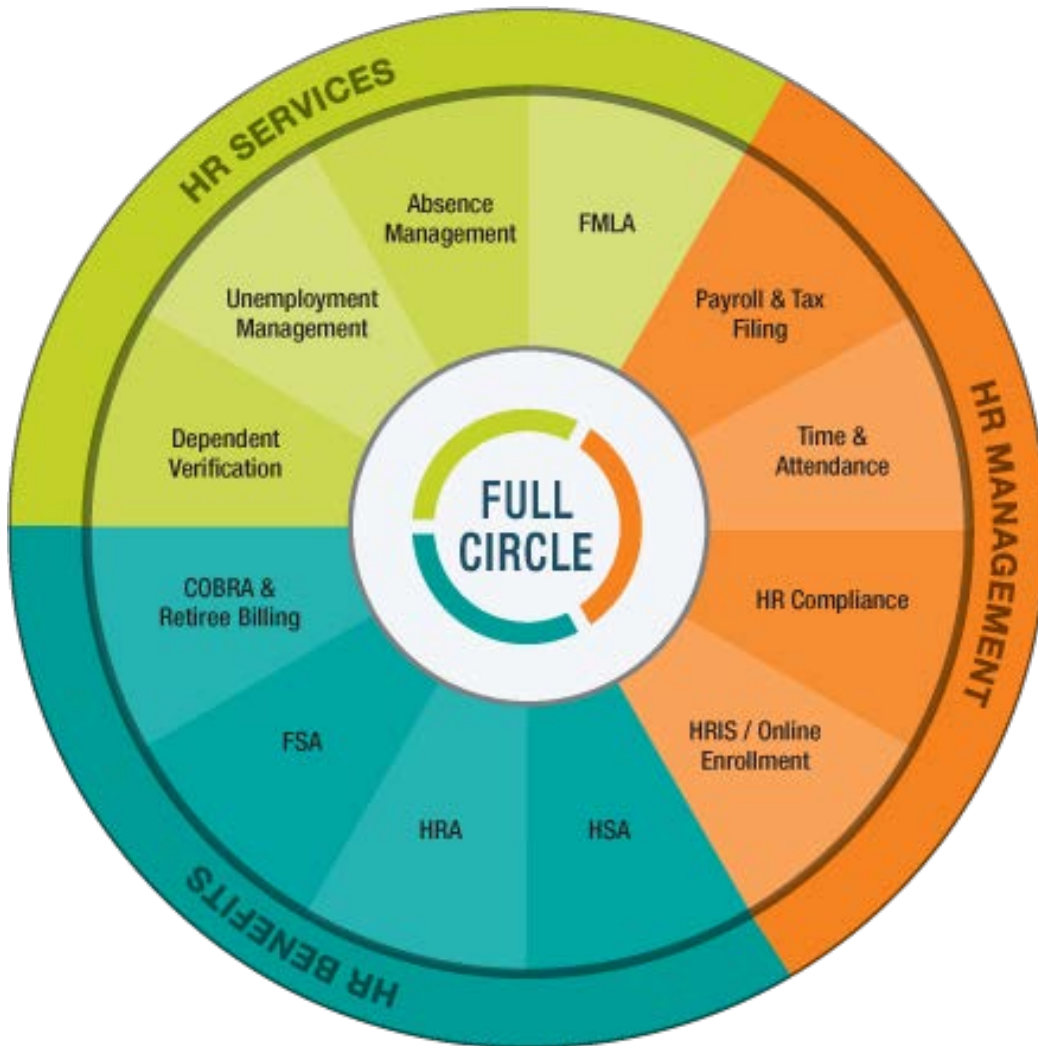
Presented by: Jeff Nowak



- HR Benefits
- HR Management
- HR Services

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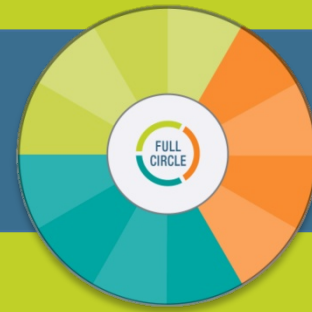


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Agenda



- Is a text message good enough? Recognizing an employee's need for FMLA leave
- When an employee does not want FMLA to apply
- Social media posts and FMLA leave
- The latest on managing FMLA intermittent leave, seeking recertification
- The Age-Old question: Leave as an ADA Reasonable Accommodation – When is Enough Plenty?



***“But Boss, I Sent You a Text.
Ain’t That Good Enough?”***

Employee Notice



- Susie is a supply clerk: has two elderly parents who require her support and attention
- Pattern:
 - On some occasions, Susie leaves voicemail that she is taking dad to doctor's appointment
 - Other occasions she texts her manager that her dad is "not well" and needs to look after him today
- Occasionally, Susie reports her absences late
- Susie's supervisor now wants to discipline her for her poor attendance

What Can an Employer Ask An Employee?



- “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:
 - Employee needs to care for family member
 - Medical facts; seriousness of medical condition; treating with a doctor for the condition
 - What kind of care the employee is providing
 - When it will be provided
 - Time periods involved (start and expected return)
 - Her own condition!

Enforce Your Call-In Policy!



- Employee must comply with employer's usual and customary notice and procedural requirements for requesting leave *absent unusual circumstances*
 - Foreseeable (30 days in advance)
 - Unforeseeable
- If employee does not follow, FMLA may be delayed or denied

Courts Not (Yet) Ready for Texting?

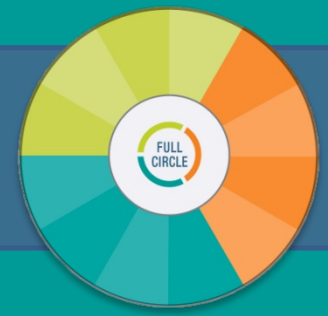


- *Lanier v. Univ. of Texas S'Western Med. Cntr.*, 2013 WL 2631316 (5th Cir. 2013)
 - IT employee; on-call
 - Texted supervisor: would be absent from call duty that evening because father in emergency room; later was terminated
 - Court ruling
 - Text message asking to be relieved from on-call duty “insufficient to put employer on notice”
 - She had taken leave before, should know rules

Courts Not (Yet) Ready for Texting?



- *Banaszak v. Ten Recovery Network.*, 2013 WL 2623882 (6th Cir. 2013)
 - Office manager; depression
 - Texted supervisor: not coming in b/c “not well”
 - Doctor note: vague reference to “symptoms and new medications added”
 - Texted supervisor again: doctor name/number
 - Another: “off until 7/12 per my doctor for medical reasons”
 - Court ruling
 - Text messages did not demonstrate that she needed leave for a serious health condition
 - Did not follow employer’s call-in procedures



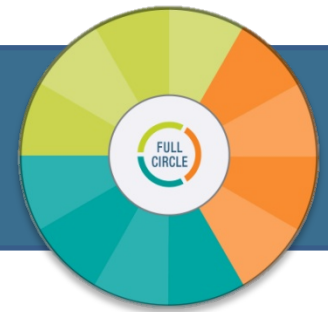
***“I Need to Take Leave.
But How Bout We Not
Call It FMLA...”***

Need Leave...But Not FMLA Leave?



- Maria seeking leave to care for her father
 1. Maria to supervisor: “Father is no good...need to take vacation.” Supervisor approves two weeks of vacation
 2. Maria to supervisor: “One or two weeks free for me.”
 3. Supervisor confirmed that Maria did not want to take any more than the two weeks of vacation
 4. Maria to plant sup’t: “I’m going to Guatemala because my dad is very ill. I am only going with two weeks vacation but could you do me a favor and give me one or two weeks more leave; Sup’t says “No”
- Maria was an FMLA pro: 15 previous leaves
- Maria: no contact until two weeks after scheduled return; terminated for NCNS

Need Leave...But Not FMLA Leave?



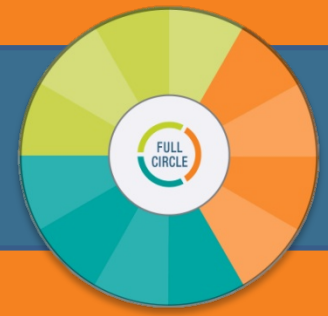
- Maria files FMLA interference lawsuit
 - Caring for her ill father triggered FMLA protection
 - She notified her employer of the need for leave for this purpose, so her employer was obligated to designate her absence as FMLA leave
- *Key issue: Can an employee decline FMLA?*
- Court: Circumstances in which employee might seek time off but intend not to exercise his or her rights under the FMLA

Escriba v. Foster Poultry Farms (9th Cir. Feb 25, 2014)

How Do Employers Deal with Decision?



- Do Employers follow the *Escriba* decision?
 - Employers have obligation to designate FMLA leave
 - Designating avoids administrative nightmares
- Ignore *Escriba* decision?
- What do you tell your employees?
 - Employer must designate
 - Employee wants leave designated – protects job!



Social Media...Meet my friend, the FMLA

The Social Media Bust



- Gia: Mailroom clerk; needs to care for mom in Mexico
- Needs continuous leave for 4 weeks; provides certification
- Two weeks into Gia's FMLA leave, one of Gia's co-workers, Molly, tells Director of Employee Relations:
 - Molly is Facebook friends with Gia
 - She was on Gia's Facebook page
 - Photos show Gia with girlfriends traveling in Germany
 - A photo – one of many – was posted last night showing Gia's location in Stuttgart, Germany

Here's the photo of her new FB profile pic
Gia 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

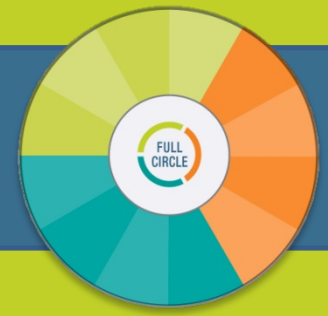
“Honest belief/suspicion” test (7th Cir.):
An employer “need not conclusively prove that [the plaintiff] had misused her leave; an honest suspicion will do.”

- Analysis is largely fact-intensive

Honest Belief: Best Practices

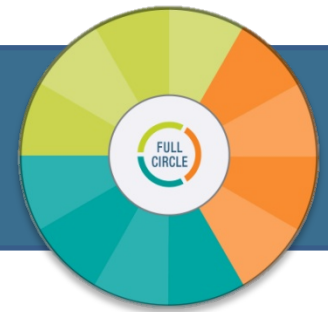


- Courts look for complete/exhaustive investigation
- Employers **lose** when there is no sense of “due process” or there is a rush to judgment
- What is a complete investigation of the facts?
 - Get complete facts, gather information, mindful of state laws
 - Meet with Gia, and during meeting:
 - 1) 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 Mexico during entire time period; inquire whether she left the country
 - 5) Show her Facebook entries
 - Timing of meeting



Best Practices in Recertification

Fred Seeks Recertification



- Fred is one of your direct reports
- Suffers from irritable bowel syndrome
 - Certification indicates 2 days/mo; 1 day ea.
 - Over the past month:
 - Been absent 3 times, one absence 3 days duration
 - All on M or F
- Can we seek recertification? If so, why?
- What does recertification look like?

Recertification

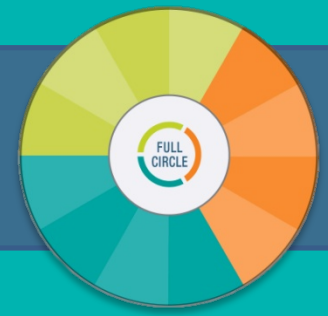


- General Rule:
 - No more often than every 30 days and with an absence
 - If duration specified is longer than 30 days, cannot seek recertification until that period is exhausted
 - Exception: Employer can seek recertification every 6 months, regardless of duration
 - Others:
 - Employee requests an 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?
- 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



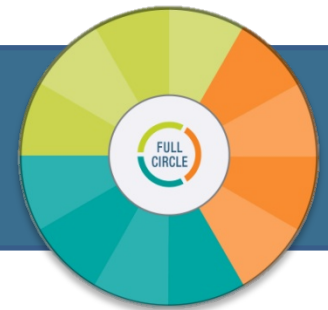
Where FMLA Ends, the ADA Begins!

Some of the most Difficult Scenarios: Depression, Anxiety



- Johnny, finance manager
- Medical issue: generalized anxiety disorder, depression
- Based on conditions, Johnny instructed by doc to refrain from “stressful” activities
- Takes periods of STD and exhausts FMLA leave within 5 months
- When FMLA leave expired, he submitted updated STD documents supporting continued need for leave – no specifics
- Johnny: Doc wants me to take extended absence; seeking four months off

What Information is an Employer Entitled to?



- Medical condition or facts at issue (no diagnosis!)
- How condition affects employee's ability to perform essential job functions; and what job functions
- Whether doctor can identify any accommodations that would help employee perform job functions
- Expected date upon which employee can perform essential job functions
- Will requested leave allow employee to perform essential functions in near future?

Continued Need for Leave



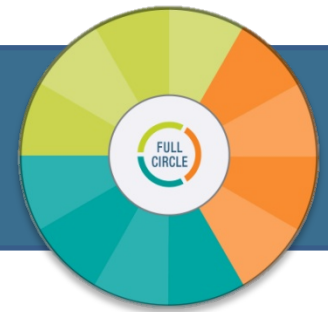
- Allow him to take leave through 26 wks (thru Feb 28)
- Two days shy of 26 wks, he requests another two weeks to take care of father and for “personal illness”
- Leave granted, but warn him that you expect him to return on March 14, 2017
- March 12: Returns a doctor’s note: “Medical leave of absence until March 22.”
- March 22: Another doctor’s note: “Unable to work. Appointment in one mo. Needs leave thru April 22”
- It’s March 30, 2017. What do you do?

Leave Denied, Termination Upheld!



- *Whitaker v. Wisconsin Dept. of Health Services*
(7th Cir. 2/27/17)
 - Bad back
 - Exhausted FMLA leave, employer leave
 - Attendance essential to the position
 - Doctor’s note insufficient – Did not explain:
 - Whether Whitaker was receiving treatment
 - Likely effectiveness of the treatment
 - Medical likelihood that leave would enable her to return to work regularly
 - *Not qualified under ADA !*

EEOC Position on Indefinite Leave



- Employers have no obligation to provide leave of *indefinite* duration
- *EEOC Resource:*

“Indefinite leave – meaning that an employee cannot say whether or when she will be able to return to work at all – will constitute an undue hardship, and so it does not have to be provided as a reasonable accommodation.”

Employer Three-Step



First Request for Extension: Granted, but immediately afterward, assess hardship



Second Request: Communicate hardship to employee, set date certain for return



Third Request: Leave denied

“Costs” to Employer: Undue Hardship?



- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error
- Lower quality and less accountability for quality
- Lost sales
- Less responsive client service and increased client dissatisfaction
- Deferred projects
- Increased burden on management staff required to find replacement workers, or readjust workflow or readjust priorities in light of absent employees
- Increased stress on overburdened co-workers
- Lower morale

But really, how does this work?



- Give serious consideration to employee's request
- Interview supervisory staff to determine:
 - How employee's work has been absorbed and may continue to be performed
 - What are the hardships created by the absence (deferred projects, disproportionate amount of work, quality issues)?
- Document the alternatives you have examined to extend leave and the undue hardship
- Don't Forget about Reassignment!
- Before termination, justify—with documentation—the rationale for the decision



FMLA Insights

Guidance & Solutions for Employers



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Can an Employer Require That an Employee Submit FMLA Certification from a Specialist to Support the Need for FMLA Leave?

By Jeff Nowak on November 4, 2016
Posted in Medical Certification

When it comes to FMLA medical certification, my clients have many complaints.

One beef, in particular, is vague medical information they receive on a certification completed by the employee's primary care physician. This is particularly true where the employee's mental health is at issue. Employers (rightfully) complain that they deserve medical information from a specialist who is far more knowledgeable about the employee's specific medical condition. As a result, my clients ask me whether they can require that the employee return initial certification or fitness-for-duty certification from a specialist.

I have been a bit reluctant to give the green light. Until now.

Facts

Take the case of Erica, a community outreach worker for the City of Milford. Erica had a knack for taking a leave of absence after she was disciplined or coached about her performance. Coincidence, I'm sure. On one such occasion, Erica requested a continuous leave of absence due to "severe anxiety." In support of her leave, Erica submitted certification from her primary care doctor, who indicated that Erica was "under care of psychiatrist and therapist."

Given the psychiatric nature of the problems that led to Erica's leave of absence, the City's HR Director required that Erica submit a "new" certification from her "treating psychiatrist." Even more, she told Erica that she also would be required to provide fitness-for-duty certification from the same psychiatrist to confirm that she is able to perform the duties of her job at the conclusion of her leave.



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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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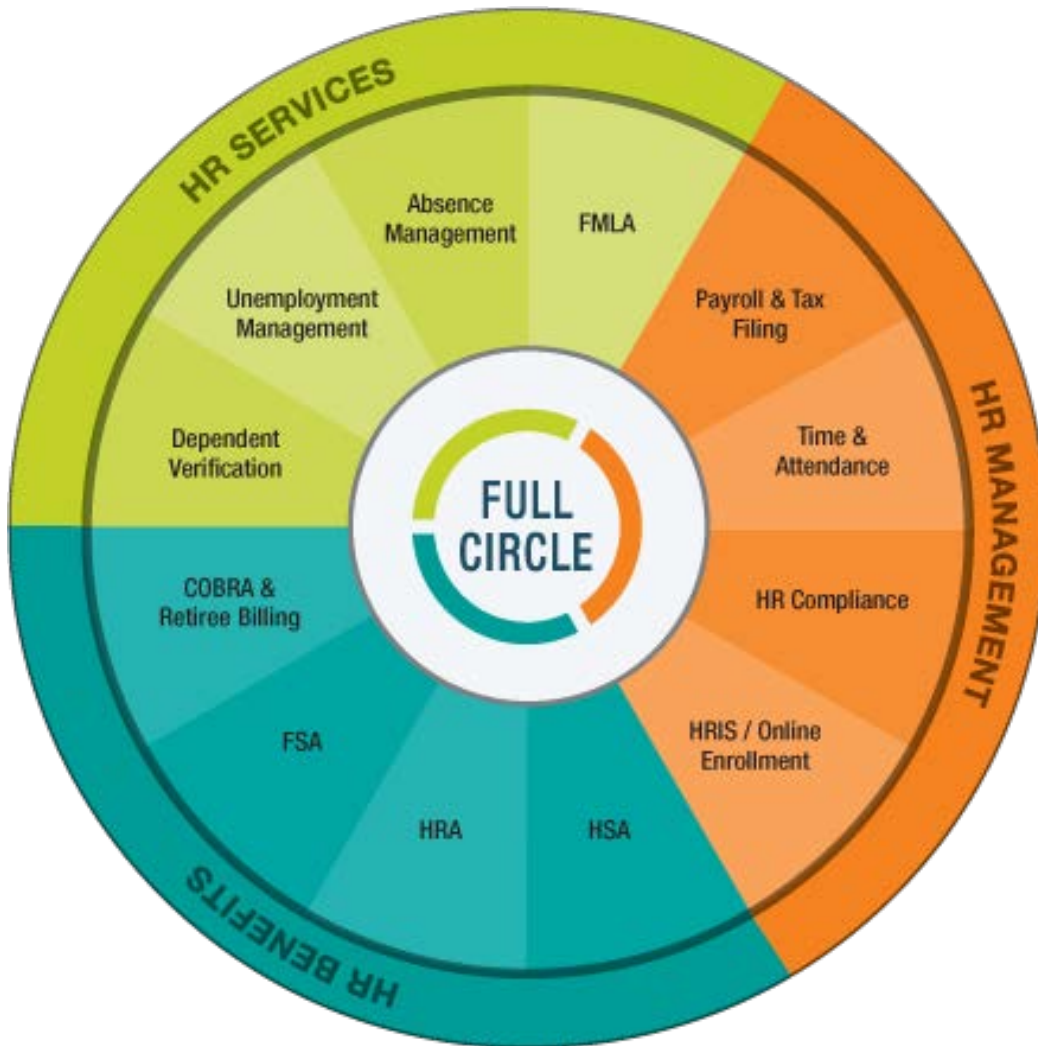
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