ABSENCE MINDED

Insights on FMLA and ADA risks

March 2016 Jennifer Bartley

Cigna

Together, all the way."

882980

- 1. The cost and drivers of absence
- 2. Prevention and intervention
- 3. Compliance Concerns
- 4. FMLA & ADA tips
- 5. Solutions and Strategies to get it right

AGENDA

Absence is costly

How much does absence cost a 1,000-employee company each year?¹

\$18,000,000

This translates to **\$18 million** based on an employer with 1,000 workers/average salary = \$50,000



\$4 million is due to **unplanned absence**²

1. Mercer/Kronos Survey, "The Total Financial Impact of Employee Absences." 2010.

2. Mercer, "Survey on Absence and Disability Management." 2013.

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Drivers of increased absence rates

Behavioral health conditions on the rise

1 in 15 diagnosed with major depression each year. Leading cause of disability in the U.S. for ages 15-44²



1. Based on a Cigna 2013 internal analysis of data from our Short Term Disability book of business for the years of 1993 through 2012 (excludes maternity claim data).

2. NIMH RSS Web, "The Numbers Count: Mental Disorders in America." February, 2014.

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The challenges. The opportunities. Managing intermittent leave.

Abuse/Fraud

"Spring fever" "Weekend extenders" "Poor performer avoiders"

Determining "serious health condition"

Tracking/ Administering

Manage employee responsibilities and expectations

BIG CHALLENGE

80% of organizations say it's the most difficult activity to manage¹

48% of employers reported never denying leave for any reason²

43% of employers spend 10-30 minutes requesting and/or reviewing documentation every time an FMLA leave is taken³

BIG OPPORTUNITIES

- Consistent tracking and administration
 Only about 50% of family medical leaves were also a short-term disability event⁴
- Allows for deeper understanding of absence drivers Employees on a family medical leave are 50% more likely to experience a future disability event⁵

1. DMEC/Spring Consulting, "Employer Leave Management Survey." 2013.

- 2. Equal Employment Advisory Council, citing Department of Labor's latest FMLA survey, March1, 2013.
- 3. Mercer/Kronos Survey, "The Total Financial Impact of Employee Absences." 2010.

4. Cigna Internal Review, 2015.

5. Integrated Benefits Institute, "Early Warnings: Using FMLA to Understand and Manage Disability Absence." February, 2013.





The right approach. The right results.

Value for EMPLOYEES:

Value for EMPLOYERS:

Prevention Stay healthy and on the job

Intervention Get back to health and back to business



Administration manage and track leave absences

Compliance comply with state and federal laws

Analysis uncover and reverse costly trends

BETTER SAVINGS. BETTER BOTTOM LINE.

Benefits that start on day one, not just when a leave is filed.



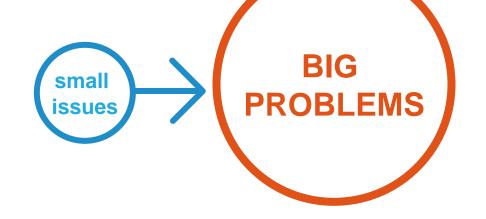
Too Often, Employees Don't Know What Support Programs are Available to Help

• Employers want to maximize employee engagement in health management and support programs to help reduce absence and medical costs



...and small issues can turn into big costly problems.

 When a disability occurs, it is a "teachable moment" and can be used to boost engagement and address a problem before it gets bigger





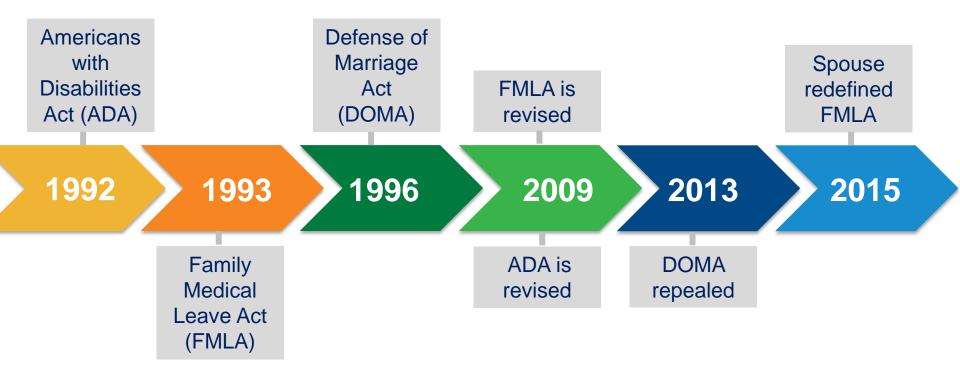
COMPLIANCE CONCERNS

How would you feel about turning over your FML records to the DOL





Change is constant. Challenge keeps growing.





Department of Labor (DOL) update

DOL enforcement update

- Same sex spouses
- Focusing on systemic issues
- On-site audits
- Renewed emphasis on record keeping compliance





DOL audits

U.S. Department of Labor

Wage & Hour Division Atlanta District Office 61 Forsyth St., SW Fm. 7h00 Atlanta, GA 30303 678-237-0554 FAX 678-237-0554



Sent via email to: XXXXXXXXXXXXXXX

XXXXXXX

Re: Wage and Hour Investigation

Dear ABC Corporation :

The Wage and Hour Division (WHD) of the U.S. Department of Labor is responsible for administering and enforcing a number of federal labor laws, including the Family and Medical Lawe Act of 1993 (FMLA). The FMLA applies to all public agencies, including state, local and federal employers, local education agencies (schools), and private sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers and successors of covered employers. This letter is to inform you of WHD's plans to visit/call your establishment on XXXXXXXX to determine your compliance with the FMLA.

Section 106 of the FMLA and the regulations found at 29 CFR 825.500 authorize the Department to conduct investigations and inspect records. Section 106(a) of the FMLA gives the Department the same investigative authority as provided under section 11(a) of the Fair Labor Standards Act (FLSA). Section 11(a) of the FLSA provides that "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter or which may aid in the enforcement of the provisions of this chapter."

Section 106 also requires that any employer make, keep and preserve records pertaining to compliance with the FMLA in accordance with section 11(c) of the FLSA and in accordance with regulations issued by the Secretary. The enclosed fact sheet and guide and the WHD website http://www.dol.gov/whd/finla/index.htm provide additional information about the legal requirements of the FMLA and WHD's investigative procedures.

I will visit your establishment on XXXXXXXX at 0900 to determine compliance with the FMLA. The normal procedure is to hold an opening conference with a representative of the company, check certain records for a two-year period, interview a representative number of employees, and hold a closing conference to discuss the results of the investigation.

In order to conduct the investigation with as little disruption to your business operations as possible, please have available for our inspection on the above date, the documents providing the following information for the last two years, ending with your last completed payroll: In 2013, DOL implemented an enforcement strategy that included more on-site investigations and policy reviews.



1. US Department of Labor releases fiscal year 2014 budget request. <u>http://www.dol.gov/opa/media/press/opa/OPA20130661.htm</u>, April 10, 2014; Fiscal Year 2014 Congressional Budget Justification U.S. Equal Employment Opportunity Commission, http://www.eeoc.gov/eeoc/plan/2014budget.cfm Confidential, unpublished property of Cigna. Do not duplicate or distribute. Use and distribution limited solely to authorized personnel. © 2015 Cigna

What employers can expect



The request for employment records is VERY broad

Not uncommon to have very short timeframe between notice and actual visit

No allegations of specific complaint or wrongdoing

Can conduct employee interviews

The investigation could expand beyond one location if systemic issues are found

Updated policy and accurate tracking for all leave types is critical

Equal Employment Opportunity Commission (EEOC) update

EEOC enforcement update

- Focusing on systemic issues
- Integrated case management
- Aggressively utilizing press releases
- Post ADAAA emphasis is on interactive process





EEOC press releases



U.S. Equal Employment Opportunity Commission

PRESS RELEASE 5-7-14

Sneakers Corp / Just Sneakers to Pay \$18,000 to Settle EEOC Disability Lawsuit

Legally Blind Veteran Denied Accommodation and Fired, Federal Agency Charged

BIRMINGHAM, Ala. - The Sneakers Corporation, doing business as Just Sneakers, Inc., will pay \$18,000 and furnish other relief to settle a disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC), the agency announced today. The EEOC had charged the athletic specialty store with violating federal law by discriminating against a legally blind sales clerk because of his disability. Just Sneakers is a Georgia corporation operating athletic specialty retail stores in Georgia and Alabama.

The EEOC alleged in its lawsuit that, after rehiring a former employee into a sales clerk position at its Enterprise, Ala., store, Sneakers terminated him because of his blindness without discussion or consideration of any reasonable accommodation. The employee, Kyle Dalton, experienced vision loss during his service in the U.S. Army, and after he was medically discharged, he tried to return to his former job with Sneakers as a sales clerk. After less than a week, Sneakers fired him without considering whether an accommodation, such as a magnifying glass or a new computer monitor, might be reasonable. The EEOC also alleged that Sneakers treated non-disabled employees more favorably, including not terminating them when they actually displayed performance problems.

Such alleged conduct violates the Americans with Disabilities Act (ADA), which requires employers to provide reasonable accommodations to disabled workers. The EEOC filed suit (*EEOC v. The Sneakers Corporation.*, Case No. 1:12-cv-00827-TFM) in U.S. District Court for the Middle District of Alabama after an investigation was completed by the EEOC's Mobile Local Office and after the agency first attempted to reach a pre-litigation settlement through its conciliation process.



FMLA & ADA BASICS & STRATEGIES FOR SUCCESS



Know the regulations and the risks



12 weeks of leave	Determining eligibility
Employees maintain health benefits	Coordinating leaves
Job protection	Staying compliant



Don't forget about state laws



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Coordination of leaves: to control costs, every absence needs attention



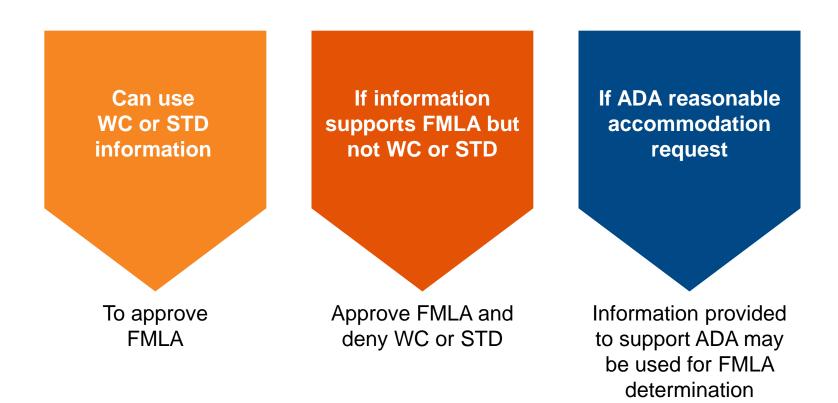




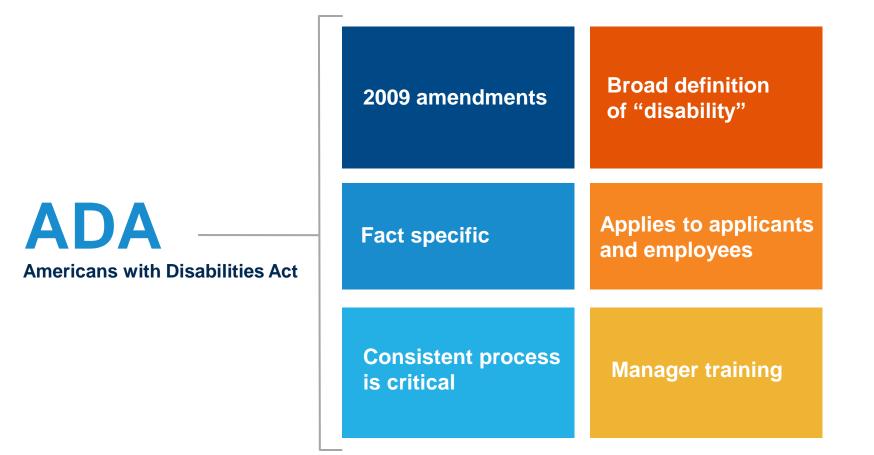




Coordination of leaves



Know the regulations and the risks





Employer obligations under the ADA

Interactive process

Reasonable accommodations

• Must engage with employee

- Conduct individualized assessments
- Document the process

• Assist employee in performing essential job functions

- Fact specific
- · Accommodation must be "reasonable"

Inflexible Leave policies = regulatory risk

- Unpaid leave can be a reasonable accommodation
- · One size does not fit all
- Duration of leave depends on circumstances



The interactive process – tips



Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013)



- Nicholas Keith sued County after not being hired as a lifeguard because he was deaf.
- Keith was initially offered the position, subject to his passing a medical examination.
- The examining physician, however, refused to clear Keith, stating, "He's deaf; he can't be a lifeguard."
- When the County refused to hire Keith, Keith filed a lawsuit alleging disability discrimination under the ADA.
- On appeal, the court held that questions of fact remained as to whether or not Keith was "otherwise qualified" under the ADA.

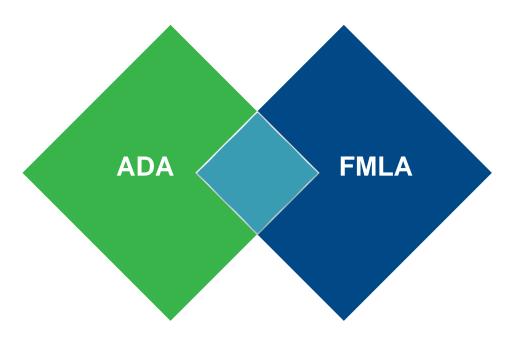




LEAVE AS A REASONABLE ACCOMMODATION

Coordination of leaves – ADA and FMLA

- Don't forget the ADA when administering FMLA leave
- An FMLA serious health condition can also qualify as a disability under the ADA
- Employees may be entitled to leave as an ADA reasonable accommodation if not eligible for FMLA



Leave as a reasonable accommodation



- Unpaid leave can be a reasonable accommodation
- Can the employee be transferred into a vacant position?
 - If not, unpaid leave may be a reasonable accommodation until a position opens up
 - Length of leave is fact specific
 - Watch inflexible leave policies

"We only offer leave for employees on workers' compensation." "That's our policy."

"You can come back to work once you have a full release."

"She said she was sick, but she never said she was *disabled*."

"The employee didn't actually ask for an accommodation."

"His doctor released him, but we can't take that risk."





SOLUTIONS & STRATEGIES TO GET IT RIGHT



A leave of absence policy is the foundation... on which *all* absence programs are built

Does the policy help:

Comply with FMLA & ADA regulations? Prevent and reduce costly absences? Optimize health, productivity and savings?





1 out of every **4** employers are not using any type of system for managing and tracking ADA¹

1 out of every **5** employers are not using any type of system for managing and tracking FMLA¹



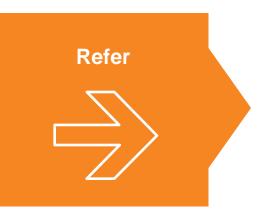
1. DMEC/Spring Consulting, "Employer Leave Management Survey." 2013.

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Early intervention can reduce costs



Reach out Explain process Set expectations Insight to challenges



Refer Vocational services EAP Health & Wellness Learn

Review Pattern analysis Frequency/duration Monitoring

Lower risk = lower cost

5% of high risk customers drive almost 50% of costs¹

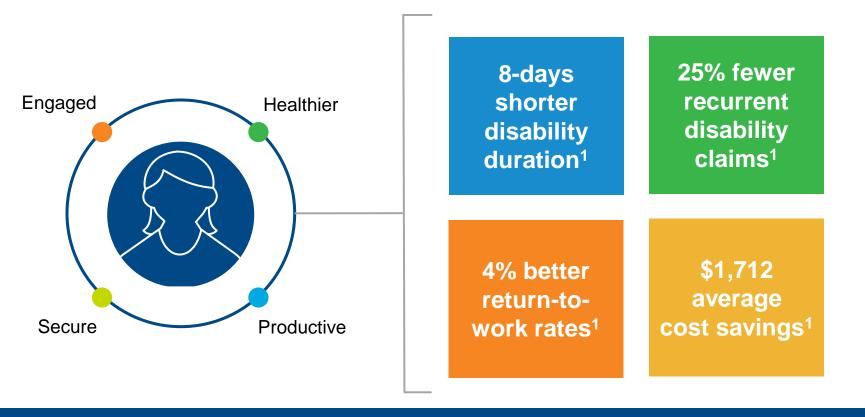
Leverage existing programs to target specific absence risks

 Published in the NIHCM Foundation Data Brief for July 2011 from the analysis of data from the 2008 Medical Expenditure Panel Survey. The top 5 percent of the population accounted for almost half (47.5 percent.)
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The value of an integrated absence management program

Companies who combine Cigna disability and leave administration can see improved absence and savings



6.9:1 ROI for 1,000 life company²

Total cost per employee² = \$21 Total savings per employee² = \$146

- Cigna internal book of business study, 2013 vs. those with disability only. Test for statistical significance was conducted at the 95% confidence level. For illustrative purposes only. Results are not guaranteed and actual client results will vary. Disability plans are insured or administered by Life Insurance Company of North America or Cigna Life Insurance Company of New York.
- Cigna.
- 2. Cigna FMLA/STD Return on Investment Tool. June 2015. For illustrative purposes only. Results are not guaranteed and actual client results will vary.

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