H|R Conversation
Navigating Employee Health Leave

Webinar Presentation
October 5, 2017

Presented by the Offices of:
Human Resources, Legal Services & Insurance, Worker’s Compensation
Opening Prayer

"If the Americans were as expert in spiritual matters as they are in business affairs, all of them would be saints."
~ Blessed Francis Xavier Seelos

Fostering a climate in which every staff member views him/herself as a valued member of the community.
### OUR PANEL

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
</tr>
</thead>
<tbody>
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</tr>
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</tr>
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</tr>
<tr>
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</tbody>
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10/5/2017
Navigating Today’s Conversation

REVIEW your Policies / Procedures

ANTICIPATE Issues/Problems

LOOK to Available Resources

COLLABORATE to Provide Solutions

10/5/2017
Navigating Employee Health Leave

Webinar Roadmap

Ainsley

10/5/2017
**Talking Points:**

**Mandated Protections**
Worker's Compensation

**New Initiation of Claims Process**

**Benefits Eligibility**

STD | LTD

NEW Claims Initiation Process / Transitions from STD to LTD

**Need for Leave**

Pregnancy Considerations

- **Federal PDA**
  treat as any other disability

- **LA. Pregnancy Statute**
  up to 16 weeks for medical necessity

- **Parental Bonding | FMLA**

**Need for Extended Health Leave**

- **ADA** - interactive dialogue
  additional leave as an accommodation

**Separation of Employment**

for inability to come back to scope of the work

**Who pays insurance premiums**
during UNPAID OR EXTENDED leave periods

Who pays insurance premiums during UNPAID OR EXTENDED leave periods

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https://www.arch-no.org/hr

https://www.catholicmutual.org/

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Worker’s Comp

INJURED AT WORK?
Inform Your Supervisor Immediately & Call
Archdiocese of New Orleans/CoreCare Management Triage
to Speak with a Triage Nurse. All Employee Injuries Need to be Called into
this Number Immediately. Call 911 if injury is life threatening.
24 hours per day, 7 days per week.

877.295.6747

Mike Dupuis
Navigating Employee Health Leave

slide 8
10/5/2017
Guardian Disability Insurance

Archdiocese of New Orleans
Plan Number: 538250

Protect your paycheck if you are unable to work.

Guardian Short Term Disability Insurance

- Plan Design Provisions
- Employee Coverage*: 60% to $1,000
- Weekly Benefit
- Maximum Payment Period
- Benefits Begin
- Pre-Existing Limitation
- Rehabilitation Benefit

Guardian Long Term Disability Insurance

- Plan Design Provisions
- Employee Coverage*: 60% to $4,000
- Long Term Disability is provided by your employer at no cost to you.
- Monthly Benefit
- Definition of Disability: 2 Year Own Occupation, Any Occupation Thereafter
- Maximum Payment Period: Social Security Normal Retirement Age
- Benefits Begin: 91st Day Accident or Illness
- Pre-Existing Condition Exclusion: 3 Month Lookback Period/22 Month Exclusion (Full Continuity of Coverage If Transferring From Another Carrier)
- Rehabilitation Benefit: Voluntary, 110% Enhanced Benefit

Navigating Employee Health Leave

Ainsley & Pam

10/5/2017
Navigating Employee Health Leave

Federal PDA
Pregnancy Discrimination Act

- U.S. Equal Employment Opportunity Commission
- FACT SHEET

Pregnancy Discrimination

The Pregnancy Discrimination Act (PDA) is an amendment to Title VII of the Civil Rights Act of 1964. Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees who are similar in their ability or mobility to work.

- State Pregnancy Statute

ANO Policy | 1.1.16
for Benefits Eligible Staff
Parental Bonding Leave

10/5/2017
Federal Employment Laws: Family & Medical Leave Act | FMLA
Family and Medical Leave (FMLA): Requirements for the Employer

In accordance with the Family and Medical Leave Act of 1993 (FMLA), locations who meet Employer Coverage requirements as defined by the statute may grant up to 12 weeks of family and medical leave during any 12 month period to eligible employees.

Employer Coverage FMLA applies to all:

• Private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year - including joint employers and successors of covered employers.
Family and Medical Leave (FMLA):
Requirements for the Employee

Eligibility for FMLA Leave

The employee must have worked for a covered entity and meet all of the following conditions:

• Has worked for the Entity / Location for at least 12 months or 52 weeks prior to the need for leave.
• Has worked at least 1250 hours during the 12 months immediately before the date the leave would begin.
• Works at a location where at least 50 employees are employed at the location. or within 75 miles of the location; Separately incorporated entities such as a Parish & its School will be considered together.
Family and Medical Leave (FMLA): Requirements for the Employee, cntd.

Basic FMLA Leave

The employee must be taking the leave for one of the following reasons:

1. incapacity due to pregnancy, prenatal medical care or child birth;
2. to care for the employee’s child after birth, or placement for adoption or foster care;
3. to care for the employee’s spouse, son, daughter or parent, who has a serious health condition; or
4. a serious health condition that makes the employee unable to perform the employee’s job.
If BOTH your entity AND the employee in question meet the requirements for FMLA, then FMLA must be provided.
Merge

Note that an employer MAY require FMLA leave to run at the same time (concurrently) with paid leave. That is legal and allowable. In such cases, follow your entity’s policy. The employee’s PAID leave would run at the same time as the FMLA leave.

Employee is also entitled to return to the “same or nearly identical job.”
Extended Health Leave

Recent “EEOC” Rulings

Additional Time as an ADA accommodation

Health Leave
Employees who have had all of their sick leave and all other accrued leave and who are unable to return to their regular duties may be granted a leave, without pay, for medical reasons. The leave may be a definite starting and ending date and may not exceed six (6) months which includes FMLA leave where applicable. During the period of leave all fringe benefits are frozen and no benefits are earned during the leave, except as specifically described below in Family and Medical Leave Act (FMLA).

The Human Resources Department may require documentation of the medical reasons in order to make a decision as to whether an employee is entitled to the leave as per the FMLA. If an employee is granted a medical leave, he or she is to be granted for maternity leave as per the FMLA.

Recent EEOC Settlements

- $20 million (July 2011)
  - Largest ADA settlement in EEOC history – inflexible attendance policy
- $8.6 million (May 2016)
  - Inflexible maximum leave policy and “regarded as” disabled claims
- $1.7 million (November 2015)
  - Inflexible leave and no fault attendance policy
- $300,000 (September 2015)
  - Inflexible leave; failure to provide additional leave past 12 weeks of FMLA
- $187,500 (April 2016)
  - Failure to provide for medical leave as an accommodation
- $100,000 (March 2017)
  - Failure to allow employee to return to work on a part-time basis as an accommodation for additional leave

“Employer-Provided Leave and the Americans with Disabilities Act”

- Equal access to leave
- Leave as a reasonable accommodation
- Maximum leave policies
- Return to work (100% healed policies)
- Reassignment
- Undue hardship

Wendy

Navigating Employee Health Leave
Federal Employment Laws: Americans with Disabilities Act | ADA
**Americans with Disabilities Act (ADA):**

**What is a Disability?**

As used in this Act:

1) **DISABILITY.**—The term ‘disability’ means, with respect to an individual—
   A. a physical or mental impairment that substantially limits one or more *major life activities* of such individual;
   B. a record of such an impairment; or
   C. being regarded as having such an impairment (as described in paragraph (3).
Americans with Disabilities Act (ADA):
What are Major Life Activities?

A. IN GENERAL.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

B. MAJOR BODILY FUNCTIONS.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
Americans with Disabilities Act (ADA):
What is “regarded as having such an impairment”?

For purposes of paragraph (1)(C):

A. An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

B. Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.
How to determine is an employee has a disability: Who has the responsibility?

Generally, an EMPLOYEE must inform employer of disability. Employer cannot and should not either anticipate or presuppose a disability.

Employee tells supervisor that leave is needed.

1. Is employee entitled to leave under contract? Follow that roadmap.
4. Employee is not entitled to leave under any of the above, what now?

10/5/2017
How to determine is an employee has a disability:
Who has the responsibility?

EMPLOYEE MAY STILL BE ENTITLED TO LEAVE IF THE LEAVE IS FOR A DISABILITY (or perceived disability)

Go back to definition of disability above. Employer may be required to grant leave as a reasonable accommodation under the ADA.

[Exception is if it creates undue hardship, more fully described further within.]
Reasonable Accommodation:

*What can you as employer do in order for employee to perform the essential functions of job?*

- Good faith cannot be overstated.
- Employer should demonstrate a willingness to try multiple different accommodations.
  - Ok to be creative.
  - Show that this is a valued employee.
- Document all efforts.
- Communicate, communicate, communicate . . . but not to the point of harassment.
- Cooperative process rather than adversarial.

Interactive Process—Communication is the key to avoiding that major accident
Suggested questions to ask employee on leave:

1) What is your physical status? Have you been released by the doctor? If so, it is a full release or a partial release? If not, do you anticipate being released and, if so, when?

2) Are you still on disability insurance? Short-term? Long-term? If so, how long do you anticipate being on either?

3) Is it your intention to return to work? If so, when? (The answer(s) to this question may be part of the answers to questions in 1 above.)

4) Do remember what the essential functions of your job are? (Show to him if not. Get a written job description.) Do you believe that you can perform each of these? Has your doctor said you can perform each of these? Would you agree for us to get something in writing from the doctor that says that you can perform the essential functions of your job?
Undue Hardship:

*Consider the following:*

- Size of employer—is this a small entity that requires each and every individual? What is impact on the business as well as on fellow employees?

- Who could take over employee’s responsibilities while out?

- What impact would it have on the employer? Does employer provide service that would be disrupted?

- What is the amount of and length of leave being requested? It would be difficult for any employer to argue that one week would be an undue hardship. Possibly one month. Several months? Is the leave all at one time or intermittent? Is there an end date for the leave or is it open ended/indefinite?

- Has leave already been taken as allowed under contract/handbook/FMLA? How did that leave already impact employer and co-workers?
Inconvenience ≠ Undue Hardship
Employment Contracts & Company Handbooks
There is no federal law that requires private employers to provide sick leave. . . but states are beginning to enact and federal contractors have new requirement

However, employers need to be aware of:

1. Is employee covered by employment contract (Teachers, for example)? What does the contract say about health leave?

2. What is in the entity’s handbook. Do they, as an employer, provide health leave? Is it paid? Does it require any documentation from employee? Should it? If it does, is that requirement being applied uniformly? Is it being applied at all? (POTHOLE)

3. Federal laws that impact the decision to grant leave.*** (MAJOR STOP SIGN)

(In other words, even if handbook and/or contract say no health leave, the employee may still be entitled to it under federal law further described herein.)

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Employment Contract

Adhere to the terms of the employment contract regarding leave. (Again, beware of the YIELD sign for federal law that also applies.) In other words, while the contract may provide specific information about health leave, employee MAY be entitled to additional leave as detailed further below.

Company Handbook

Primary resource for employees and employer should be Entity’s Handbook. What does it say about health leave? What steps must be taken? Suggest it is appropriate to review those steps following this webinar but will offer overview based on most employee handbooks.
Most employers provide some health leave for employees. If it is provided, it must be provided to ALL employees and any restrictions/requirements must be applied to ALL employees.

**Example:**

Handbook requires employee to submit documentation upon return to work for health leave that goes beyond 5 days. Employee #1 breaks a leg, has surgery, and is out for over 5 days. Returns to work to the delight of all. Supervisor does not ask for documentation. Employee #2 goes out on health leave and tells supervisor that they are checking into rehab/stress management facility for a week. Returns after 5 days and supervisor says documentation is required before returning to work.
Pothole

Supervisor’s actions may violate the Americans with Disabilities Act by treating one employee differently than another employee.
Warning

What if your handbook say employer “reserves the right” to request documentation (or similar discretionary language)? While this is legal, tread carefully if your supervisor is going to request documentation from one employee and not another. Provide some general guidelines for your supervisors (even if not in handbook) on when to request documentation so that all supervisors are adhering to the same guidelines. Cannot make the request for any discriminatory reason (women only, for example).
Yield

As above, again, employee may be entitled to leave in addition to what is granted by the handbook. Federal and state law trumps policy and handbooks.
Returning to Work

FMLA / ADA

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What is “nearly identical”? 

- Title 
- Salary 
- Schedule 
- Same or similarly situated location 
- Sane or substantially similar duties, responsibilities and status 
- Identical benefits
Getting Medical Information/Documentation

Do you as employer have the RIGHT to get updated medical information/documentation from employee? Yes. Employer may request IN WRITING certification every 30 days during leave. Employer also has the RIGHT to demand a second opinion but BE CAREFUL as you don’t want to be seen as harassing the employee.
What Happens at the expiration of the 12 weeks of FMLA?

Must employee return to work? What is employee still ill/injured, etc?

Additional time off, over and above the 12 weeks of FMLA, is often a reasonable accommodation under the Americans with Disabilities Act (ADA).

Can employer have a 12 weeks and you must return policy? No, this is illegal.
Final Considerations

- Who Pays Benefits Premiums during extended leave?
- What is the cost-share?
- How communicated to staff member?
- If employee in non pay-status, premiums owed upon return?
- If/when appropriate to cancel coverage?
- Don’t leave “Inactive” forever
- Follow ANO Guidelines
Navigating Employee Health Leave

Resources

EEOC - Resources Index
Dept. of Labor Fact Sheets

https://www.arch-no.org/hr

10/5/2017
Thank you for Joining our Conversation!

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10/5/2017