

The Cost of Overlooking Absence Management

Coordinating FMLA, ADA, Workers Comp, etc.

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Higher Education Practice

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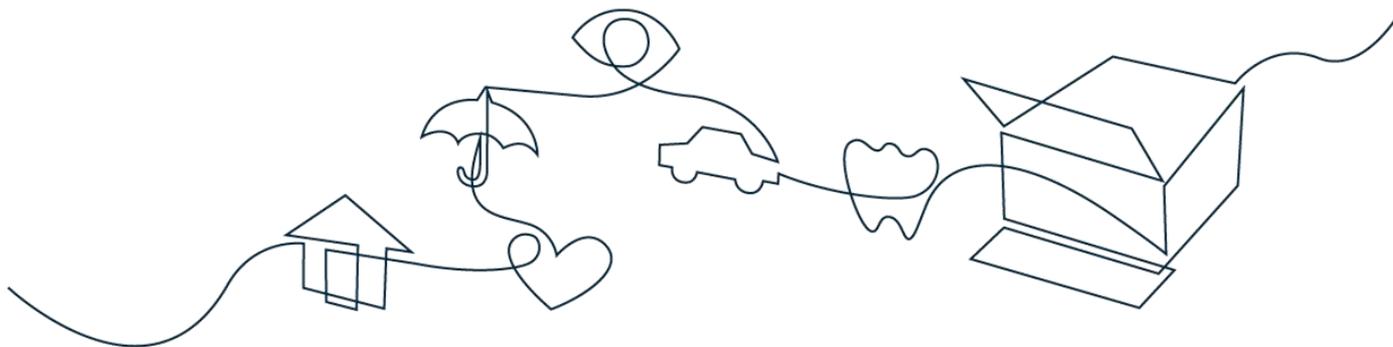
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Agenda

- ✓ Cost of mis-managing Absence Management
- ✓ Manage requirements of FMLA, ADA, Workers Compensation
- ✓ Examples of Absence Management situations
- ✓ Solutions





Why Does Absence Matter? Current Reality Facing Employers

Compliance is becoming more challenging and employers are at a great potential risk.

LTD sometimes seems to mean “Last Thing Discussed”, even though it is one of the more catastrophic risks facing employees.

Most disability programs assist the employee/claimant, but offer little support to the employer.

The ADA Amendments Act of 2008 (ADAAA) is becoming part of the absence discussion and employers face new complexities due to the potential overlap of ADAAA and Family Leave Medical Act (FMLA).

Fines and litigation are becoming more complex, contradictory, and visible, therefore potential consequences are more prevalent



Reasons for Absence Management

Compliance concerns

Complexity

Legal landscape is becoming increasingly complex.

Municipal regulations are often vague and difficult to manage.

ADAAA impact

Limited Resources

Diminished head counts

Do More With Less expectations

Cannot have experts in all locations

ACA reporting

Leave as Premier Benefits

Parental leaves

Unlimited time off

Millennials more concerned with quality of life benefits

Risk Management

Mitigate legal risk

Limited upside

DOL and private lawsuits are on the rise



Contradictions

FMLA Leave & Reasonable Accommodation

Situation

- Employee cannot work due to a serious health condition. The serious health condition is an ADA-qualifying disability. A reasonable accommodation may allow the employee to return to work.

Rules

- **FMLA** – must allow leave for an employee with a serious health condition.
- **ADA** – cannot prevent disabled employee from returning to work by withholding an offer of available reasonable accommodation.

Issue

- Can or should the employer offer a reasonable accommodation for the employee to return to work or would this violate the FMLA?



Contradictions

Extending Leave Beyond FMLA

Situation

- After 12 weeks of FMLA-qualifying leave, the employee is not yet able to return to work, and has requested additional leave.

Rules

- **FMLA** – provides job reinstatement rights for leave up to 12 weeks.
- **ADA** – requires job-protected leave as a reasonable accommodation in some instances, absent undue hardship.

Issue

- Are job protections for the employee exhausted after 12 weeks or does the ADA provide additional protections?



Contradictions

Disability Related Questions & Workers Comp

Situation

- An employee is unable to work due to a disabling injury or illness incurred in the course of employment. The employer needs to ask questions relating to the employee's ability to return to work.

Rules

- **ADA** – places restrictions on the employer's ability to ask a question (or series of questions) that is likely to elicit information about a disability.
- **Workers' Compensation** – medical certification and discussion are generally required to determine the employee's readiness to return to work.

Issue

- What line of questioning is acceptable to determine the employee's ability to return to work without violating ADA rules relating to disability-related questions?



Benefits of Absence Outsourcing

Resources in the market

Employer

Complexity
Limited Resources
Leave as Premier
Benefits
Risk Management

- Cloud Based Real Time Reporting
- Integrated Case Managers
- Combined Correspondence
- Real Time Email Notifications
- Concurrent Administration of Federal, State, Muni, Company Leaves
- ADA Support

- Single Point of Contact for both EE and ER on claims
- Quicker Notification of Leave Status for ER
- Dedicated Absence Consultants
- Greatly Mitigates Compliance Concerns



On-Site Consultant Ensures Customized Care

The key to successful disability management is having someone who can provide recommendations and customized solutions on site at the location of your choice.

Help employees return to and stay at work

- Helps HR understand when employee will return; oversees transitional duty as needed
- Communicates with employee, supervisor and physician to facilitate return to work as soon as feasible

Help manage risk

- Can step in while Workers' Compensation vendor is determining if injury was occupational
- Looks for ways to bring employee back to work via accommodations and case management

Work with ADA Specialists

- Coordinates with HR team's ADA specialists to provide support for more complex accommodation requests

Integrate benefits

- Coordinates with medical insurance
- Recommends available benefits and services (e.g., disease management and wellness programs)



How Does HR Handle Accommodations?

HR Managers are uncertain and lack knowledge of the employee accommodation process

76%

said their workforce has included an employee with a disabling condition.

63%

are unsure how to connect an at-risk employee with assistance.

48%

have little knowledge of how to implement a reasonable accommodation.

Data based on a survey of 300 respondents and conducted September 2014 by a third-party research firm hired by The Standard.



ADAAA Noise

The Top ADAAA (*ADA Amendments Act of 2008*) Mistakes Made by Employers

- Enforcing restrictive policies
- Believing accommodations are expensive
- Staying inside the box
- Devaluing an aging workforce
- Not using 3rd party consultants



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Case Studies

The cost of common mistakes

The cost of overlooking Absence Management

What NOT to do		What to do	
Common Error	Potential Cost	Solution/ Accommodation	Cost
Enforcing restrictive policies	\$5 Million	Modified duty	\$791
Believing accommodations are expensive	Lawsuit for “undue hardship”	Graduated return-to-work with assistive devices	\$3,314
Devaluing an aging workforce	\$24,000	Amplification and voice-activated software	\$1,898
Staying inside the box	EEOC target	Modified work schedule	\$430
Not using third party consultants	Prevalent mental health impairments	Support & Guidance	\$757

* Avg verdict for FMLA mismanagement \$335,000

(DMEC 2014 statistic: <http://DMEC.org>)



Common mistake... enforcing restrictive policies

Employer- Telecommunications
Provider

Occupation- Field Customer
Service Technician

Age- 60

Condition- Knee Injury

Barriers- Unable to perform driving,
lifting

Complication- No accommodated
or modified RTW options available

What Happened?

- Accommodation- Light duty
updating inventory records, field
equipment replacement and
service calls
- Outcome- Modified work, then
RTW full duty
- Consultant Cost- \$791



Cost of... enforcing restrictive policies

Solution: **Modified Duty**

What could have happened?

- “Interstate Distributor Company to Pay Nearly **\$5 Million** to Settle EEOC Disability Suit”
- Nationwide trucking firm had 2 restrictive policies:
 1. Maximum leave policy
 2. “No restrictions” policy
- EEOC said this settlement shows a need for employers to have policies permitting paid or unpaid leave as a reasonable accommodation.



Common mistake...

believing accommodations are expensive

Employer- Rural Library

Occupation- Custodian/ Courier/ Maintenance

Age- 57

Condition- ruptured thigh tendon, shoulder muscle tear, heart problems, obesity

Barriers- difficulty walking, especially stairs or inclines

What Happened?

- Intervention- Consultant coordinated with employee, employer and MD to implement accommodations
- Accommodation- Employer provided running boards for delivery van, rolling cart, and ramp for the cart
- Outcome- Return to work part-time on a graduated work schedule and full-time 4months later
- Consultant Cost- \$2,255
- Equipment Cost- \$1,059



Cost of... believing accommodations are expensive

Solution: Graduated RTW with assistive devices

What could have happened?

- “Proving “undue hardship” under ADAAA in court:
 - Fact-specific
 - Little case law on point since the amendments to ADA (which means it is unclear what the courts will say)
 - Employer has the burden of proving “undue hardship”
 - Regulations say employer must also consider outside sources of funding, including available tax credits/deductions



Common mistake... devaluing an aging workforce

Employer- Small Town School District

Occupation- Band & Technology Teacher

Age- 63

Condition- Parkinson's Disease

Barriers- Fatigue due to inability to project voice; limited left hand wrist motion; difficulty with finger dexterity, coordination, stiffness and tremors

What Happened?

- Intervention- Ergonomic assessment; coordinate installation of ergonomic equipment.
- Accommodation- Amplification system, dictation software
- Outcome- Employee has more energy as he can, 1) project his voice using amplification system and 2) use voice-activated software to prepare curriculum, grades, schedules, e-mails
- Equipment Cost- **\$1,898**



Cost of... devaluing an aging workforce

Solution: Amplified and voice-activated software

What could have happened?

- “DuPriest and Sons to Pay **\$24,000** to Silk-Screener Fired Because of Disability”
- Family-owned silk screening company fired employee of 38 years after he notified the company that he needed dialysis.
- EEOC said: “The ADA isn’t just about hiring qualified persons who may have some limited health conditions, it is also about retaining and accommodating employees who may develop impairments while working....”



Common mistake... staying inside the box

Employer- National Distribution Company

Occupation- Machine Operator Tender

Age- 36

Condition- Obesity, gastric bypass surgery

Barriers- Employee was prescribed permanent eating regimen that conflicted with work schedule and production demands

What Happened?

- Intervention- Consultant contacted physician to determine if eating regimen could match work breaks
- Accommodation- Employer provided work schedule including breaks that coordinated with eating protocol
- Outcome- Employee returned to work regular duty full time
- Equipment Cost- \$430



Cost of... staying inside the box

Solution: Modified work schedule

What could have happened?

- “Whittaker v. America’s Car-Mart, Inc.
- Severely obese employees can qualify as disabled (or regarded as disabled) under the ADA
- Circuits differ on this issue (some haven’t addressed it):
 - 5th Circuit – obesity is probably a disability
 - 1st Circuit – obesity can be a disability
 - 2nd & 6th Circuits – a physiological condition related to obesity can be a disability



Common mistake... not using third party consultants

Employer- University

Occupation- Senior Academic Counselor

Age- 50

Condition- Depression, Anxiety, Diabetes, Fatigue, Hypertension

Barriers- Multiple physiological and mental health challenges, beginning many new treatment strategies, new medications, workplace stress

What Happened?

- Intervention- Consultant provided support and guidance, communication with provider, interpretation of psychiatric records, referral to EAP, advice on how to select counselor
- Accommodation- EAP; allowed to be off work 7 weeks
- Outcome- Employee successfully returned to work full time in her previous position
- Equipment Cost- \$757



Cost of... staying inside the box

Solution: Support and guidance

What could have happened?

- Criado v. IBM Corp. – leave as a reasonable accommodation for depression, anxiety, and attention deficit disorder
- EEOC even suggests using outside resources to identify and provide reasonable accommodations.
- Mental health impairments are prevalent.



Final Thoughts

Better Results. Less Noise.

Complexity

- Federal, State and even Local laws are creating a “maze” of compliance requirements

Unique Resources and Approaches

- There are ways to proactively address employee absences versus reacting to claims, and they can help from both a compliance and productivity standpoint

Differentiate your College

- Access to uncommon expertise and resources to help you more effectively address absence and disability



Where There Are Challenges, There Are Opportunities

Take some action and apply these best practices:

- ✓ Proactively address absence and disability
- ✓ Provide more support and services
- ✓ Provide different approaches that result in a big return for employers
- ✓ Allow flexible policies
- ✓ Price out accommodation options
- ✓ Be creative / think outside the box
- ✓ Value your aging workforce
- ✓ Utilize 3rd party consultants & resources

Gallagher can help in unique ways!



Additional Outside Resources

- EEOC: <http://www.eeoc.gov/eeoc/publications/adahandbook.cfm>
- Job Accommodation Network:
www.askjan.org/media/psychiatric.html
- International Association of Rehabilitation Professionals: <http://www.rehabpro.org>

Thank You!

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