

Sage Abra HRMS

Navigating the Mine Field of Federal and State Leave Laws

**Sage HR R&R: Refresh and Recertify
Webcast Series**



Your Presenter for Today

Mary Anne Osborne, SPHR
The Osborne Group

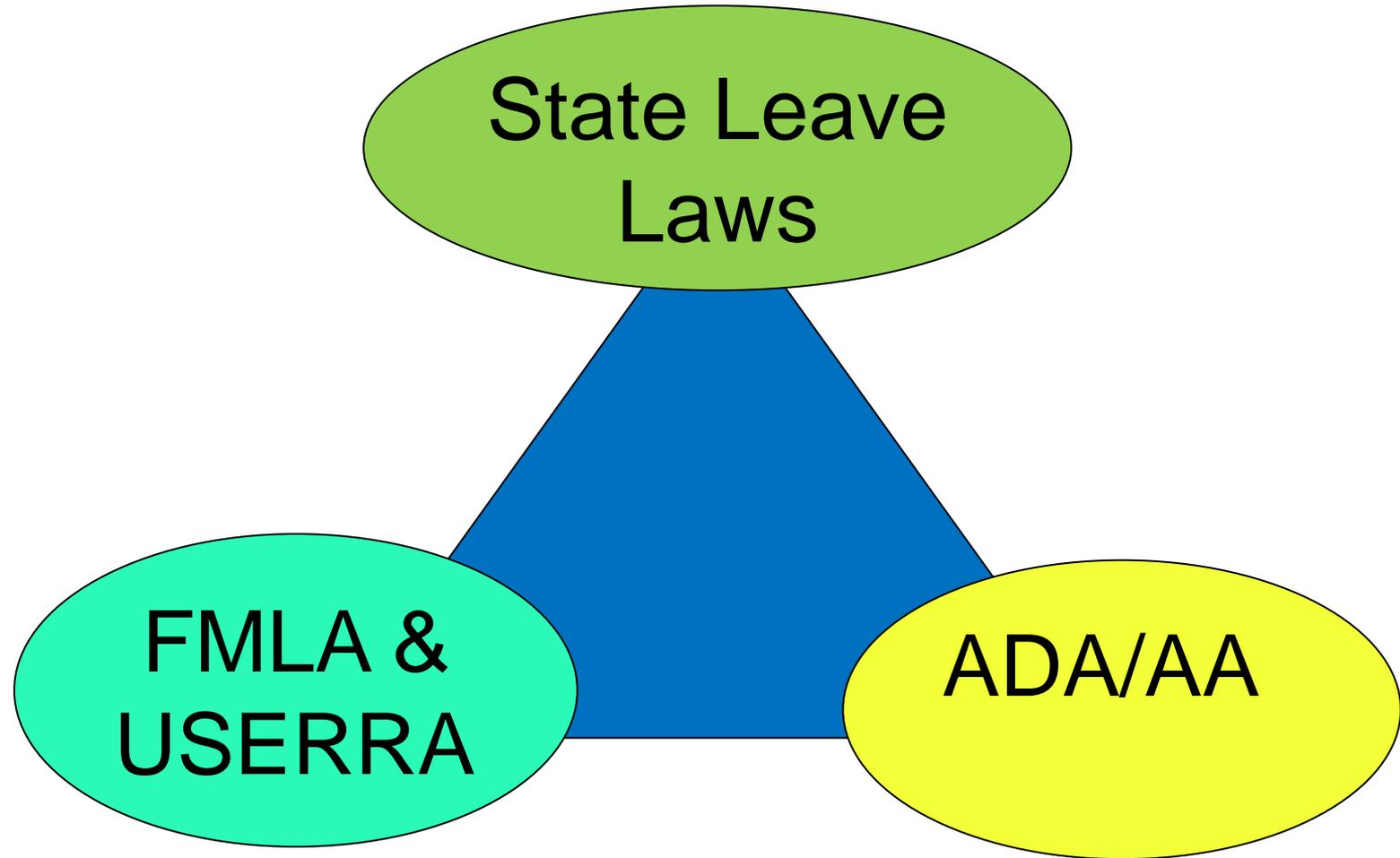
- Over 25 years of HR experience in Telecom, Financial, Manufacturing, Healthcare and Higher Education arenas
- People-centric HR Professional
- Award winning
- Business, Customer Service and Quality focused



Objectives

- Today You Will Learn:
 - How to determine when an employee qualifies for FMLA, USSERRA and ADA/AA
 - The importance of coordination of compliance and record keeping
 - Behaviors that may trigger qualifying events under federal leave programs and what managers need to know to stay compliant
 - How USERRA affects FMLA benefits and how to manage coordination of benefits

The Mine Field of Leave Programs



Uniformed Service Employment Re-Employment Rights Act (USERRA) 1994

- **2006 Revisions**

- Who is covered
- Definition of an “Employee”
- Notice of Service
- Waiving of Rights

- **Compliance**

- 2 year requirement
- Escalator Provision



2006 Defense Spending Law and FMLA

- Eligibility = FMLA eligible
- Benefits
 - 26 work weeks
- Qualifying Exigency
 - 12 weeks
 - Does Not Reduce Eligibility for FMLA Entitlements
 - Examples: Short notice deployment; military events and activities; child care and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; additional activities agreed to by the employee and employer

Family Medical Leave Act (FMLA) Qualifying Event

Pre 2009

- Incapacity of more than 3 full consecutive days with 2 visits to Healthcare Provider (HCP).
- No 7 or 30 day requirement.

Post 2009

- Incapacity of more than 3 full consecutive days with 2 visits to HCP within 30 days of the beginning of the incapacity with the first visit within 7 days of the first day of the event.
- The HCP must decide on the 2nd visit necessity, not the employer.

FMLA Qualifying Event

Pre 2009

- No 2 visit requirement.
- Employee did not have to assert rights under FMLA when seeking leave for qualifying reason.

Post 2009

- At least 2 visits to HCP per year.
- This only true when employee seeks first time leave for the qualifying event. Once FMLA granted, employee must specifically reference the qualifying reason as need for FMLA.

FMLA HIPPA

Pre 2009

- No reference to HIPPA.

Post 2009

- Employer reps contacting the employee's HCP must either be a HCP, HR professional or leave administrator or a management level official.
- Under no circumstances may the immediate supervisor contact the HCP.
- Employers may not ask for specific diagnostic information.

FMLA Medical Certification & Fitness for Duty

Pre 2009

- Employers had 2 days to request certification after receipt of need request for FMLA.
- Fitness For Duty (FFD) fell under a general job classification.

Post 2009

- Employers now have 5 days to request medical certification. Employers may request medical recertification every 30 days
- FFD certification can be job specific and may be required before an employee returns to work IF there are safety concerns.

FMLA Coordination of Paid Leave Benefits

Pre 2009

- Treated FMLA absences different from other paid leave benefits and different types of benefits were treated differently.
- Employees had 2 full business days post leave to provide notice.

Post 2009

- All forms of paid leave are treated the same regardless of type of leave.
- Employees who need to take FMLA must follow company's standard procedures for notification of an absence. If FMLA is foreseeable 30 days advance notice is required.

FMLA Notice Requirements

Pre 2009

- None

Post 2009

- If 30 days isn't possible, the employee must notify the employer the same day and no later than the next business day after learning of the need.
- Employers are required to provide the following:
 - General notice regarding FMLA
 - Eligibility notice
 - Rights and Responsibilities notice
 - Designation notice

FMLA Light Duty & Attendance

Pre 2009

- As interpreted by the courts: Employees would use up FMLA while on light duty.

Post 2009

- Light duty does not count against an employee's 12 week entitlement.
- Employers may deny perfect attendance awards to employees who take FMLA.

FMLA Waiving of Rights

Pre 2009

- The 4th Circuit ruling prohibited employees from prospectively or retro-actively waiving FMLA rights.

Post 2009

- Prospective waivers are still prohibited but an employee may voluntarily release their FMLA claims without needing DOL approval.

FMLA Penalties

Pre 2009

- Employers could be fined based on the type of failure to comply.

Post 2009

- Any harm caused to an employee by the employers failure to comply may hold the employer liable without regard to level of severity.

FMLA Eligibility

Pre 2009

- Eligibility requirements: The employee had to have been employed for immediate prior 12 months and worked at least 1250 hours in that 12 month period.

Post 2009

- The 12 months no longer need to be consecutive. Any period of employment prior to a 7 year break in service need not be considered for determining eligibility.

Strategies to Prevent FMLA Violations

- 1 • Create a Comprehensive Certification Form.
- 2 • Ask for a 2nd or 3rd opinion to verify diagnosis (be prepared to pay for these HCP visits).
- 3 • Ask for re-certifications.
- 4 • Attach a letter to certification requests along with the worker's attendance record asking the HCP whether or not the worker's condition is incapacitating enough to warrant the days of absence.

Americans with Disabilities Act As Amended (ADA/AA)

- Focus shift from compliance to determination of qualification of impairment
- Definition of a Disability – 3 parts:
 1. Physical or mental impairment that substantially affects one or more Major Life Activities (MLA)
 2. A record of such impairment
 3. Being regarded as having such impairment
- Broad coverage
- MLA's include activities as well as bodily functions
- Mitigating Measures
- “Substantially Limits”

ADA/AA

- Episodic Condition and MLA
 - Impairment need only affect 1 MLA
 - If impairment episodic or in remission but would have qualified if active, the impairment qualifies
- “Regarded As” Clause
 - If impairment is transitory or minor (expected duration of < 6 months) it doesn’t normally qualify
 - HOWEVER, if the individual can show that their impairment was subject to action prohibited by ADA based on an actual or perceived impairment—it may qualify
- Regulatory Authority

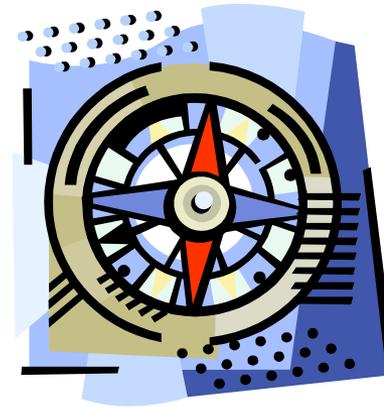
Map Out Your Strategy

- Policies
 - Well researched
 - Well written, easy to understand
 - Effectively communicated to ALL employees
 - Enforce policies consistently with all employees
- Job Descriptions
 - Specificity is the key
 - Include physical capabilities
- Behavior
 - Discipline behavior never the cause

Tools for Navigating the Mine Field

WORK RELATED ILLNESS AND INJURIES

- Decision Tree:
 - Is condition temporary?
 - Is condition a serious health condition?
 - Is condition permanent?



Tools for Navigating the Mine Field

NON-WORK RELATED ILLNESS OR INJURY

- Decision Tree:
 - Is Condition temporary?
 - Is condition serious health condition?
 - Is condition permanent or otherwise qualify under ADA/AA?



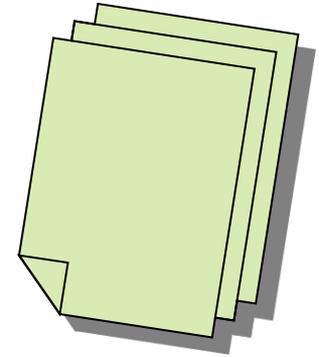
Tools for Navigating the Mine Field

- Accommodations
 - NO entitlement
 - LOA may be the best accommodation for temporary situation
- Approach each law separately



Summary

- ✓ Communicate
- ✓ Communicate
- ✓ Communicate



About Sage Abra HRMS

- Sage Abra is human resource management system software that delivers tightly integrated HR, payroll, benefits and attendance functionality, plus rich reporting and analysis tools.
- Sage Abra can help your company manage Federal and State Leave Laws with advanced tracking in employee records and both Sage Abra standard and customizable reporting (using Crystal Reports).

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