The Cost of Overlooking Absence Management

*Coordinating FMLA, ADA, Workers Comp, etc.*

Nichole Johnson & Dave Torri | April 20, 2018
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?
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?
**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

**Employer**

- Complexity
- Limited Resources
- Leave as Premier Benefits
- Risk Management

**Resources in the market**

- 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.
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
Case Studies

The cost of common mistakes
## The cost of overlooking Absence Management

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

* Avg verdict for FMLA mismanagement $335,000
  (DMEC 2014 statistic: http://DMEC.org)
Common mistake... enforcing restrictive policies

<table>
<thead>
<tr>
<th>Employer</th>
<th>Telecommunications Provider</th>
</tr>
</thead>
<tbody>
<tr>
<td>Occupation</td>
<td>Field Customer Service Technician</td>
</tr>
<tr>
<td>Age</td>
<td>60</td>
</tr>
<tr>
<td>Condition</td>
<td>Knee Injury</td>
</tr>
<tr>
<td>Barriers</td>
<td>Unable to perform driving, lifting</td>
</tr>
<tr>
<td>Complication</td>
<td>No accommodated or modified RTW options available</td>
</tr>
</tbody>
</table>

**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

<table>
<thead>
<tr>
<th>Employer- Rural Library</th>
<th>What Happened?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Occupation- Custodian/ Courier/ Maintenance</th>
<th>• <strong>Intervention</strong>- Consultant coordinated with employee, employer and MD to implement accommodations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age- 57</td>
<td>• <strong>Accommodation</strong>- Employer provided running boards for delivery van, rolling cart, and ramp for the cart</td>
</tr>
<tr>
<td>Condition- ruptured thigh tendon, shoulder muscle tear, heart problems, obesity</td>
<td>• <strong>Outcome</strong>- Return to work part-time on a graduated work schedule and full-time 4 months later</td>
</tr>
<tr>
<td>Barriers- difficulty walking, especially stairs or inclines</td>
<td>• <strong>Consultant Cost</strong>- $2,255</td>
</tr>
<tr>
<td></td>
<td>• <strong>Equipment Cost</strong>- $1,059</td>
</tr>
</tbody>
</table>
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

<table>
<thead>
<tr>
<th>What Happened?</th>
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<tbody>
<tr>
<td>• <strong>Intervention</strong> - Ergonomic assessment; coordinate installation of ergonomic equipment.</td>
</tr>
<tr>
<td>• <strong>Accommodation</strong> - Amplification system, dictation software</td>
</tr>
<tr>
<td>• <strong>Outcome</strong> - 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</td>
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<table>
<thead>
<tr>
<th>Employer- Small Town School District</th>
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<tr>
<th>Occupation- Band &amp; Technology Teacher</th>
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<table>
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<tr>
<th>Age- 63</th>
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<table>
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<tr>
<th>Condition- Parkinson’s Disease</th>
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</table>

<table>
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<tr>
<th>Barriers- Fatigue due to inability to project voice; limited left hand wrist motion; difficulty with finger dexterity, coordination, stiffness and tremors</th>
</tr>
</thead>
</table>

**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

<table>
<thead>
<tr>
<th>Employer</th>
<th>National Distribution Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Occupation</td>
<td>Machine Operator Tender</td>
</tr>
<tr>
<td>Age</td>
<td>36</td>
</tr>
<tr>
<td>Condition</td>
<td>Obesity, gastric bypass surgery</td>
</tr>
<tr>
<td>Barriers</td>
<td>Employee was prescribed permanent eating regimen that conflicted with work schedule and production demands</td>
</tr>
</tbody>
</table>

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?**

- 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
**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

<table>
<thead>
<tr>
<th>Employer</th>
<th>University</th>
</tr>
</thead>
<tbody>
<tr>
<td>Occupation</td>
<td>Senior Academic Counselor</td>
</tr>
<tr>
<td>Age</td>
<td>50</td>
</tr>
<tr>
<td>Condition</td>
<td>Depression, Anxiety, Diabetes, Fatigue, Hypertension</td>
</tr>
<tr>
<td>Barriers</td>
<td>Multiple physiological and mental health challenges, beginning many new treatment strategies, new medications, workplace stress</td>
</tr>
</tbody>
</table>
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