



FMLA & ADA Compliance

2018 Year in Review

Marjory Robertson, JD – Abigail O’Connell, JD – Brycie Repphun



Agenda



- › Introductions
- › Significant ADA/FMLA jury verdicts & settlements
- › Notable FMLA/ADA Cases
- › Statutory Activity & Trends

Today's Presenters



- › **Brycie Repphun - Account Executive, The Partners Group**
 - › Consults with clients on all aspects of their Absence and Disability programs
 - › Provides operational and Strategic Design support to The Partners Group's national Total Absence Management Practice
 - › Presents frequently at industry events on topics relevant to Absence Management including FMLA, ADA, Change Management, and Paid Family Medical Leave
 - › Graduate of the University of Wisconsin

Today's Presenters



- › Marjory Robertson - AVP & Senior Counsel at Sun Life Financial:
 - › Advises Sun Life on employment law issues, including legal issues related to absence and disability management for its employees.
 - › Supports and provides legal oversight for Sun Life's Absence and ADA administration products.
 - › Presents frequently on legal and compliance absence management issues at conferences and at Sun Life broker meetings.
 - › Graduate of Dartmouth College and Boston College Law School.



- › Abigail O'Connell - Senior Counsel at Sun Life Financial:
 - › Advises Sun Life's Group & Voluntary business on legal issues related to the Sun Life Absence & Disability Management Solutions offered to employer Clients.
 - › Frequently speaks at industry conferences about legal and compliance issues related to absence management.
 - › Graduate of Colgate University and Suffolk University Law School.

About The Partners Group



We are the leading independent benefit broker in the entire Northwest, serving customers from five regional offices.



The Partners Group (TPG) is the largest independent benefits broker in the Northwest with more than 150 employees serving clients from five offices in Washington, Oregon and Montana. TPG's culture puts people first. Whether it's our employees or our customers, we always put the interest of our people and those we serve above all else.

TPG Total Absence Management Practice



› **Industry Leading Experts**

› **80+ combined years of experience and insights**

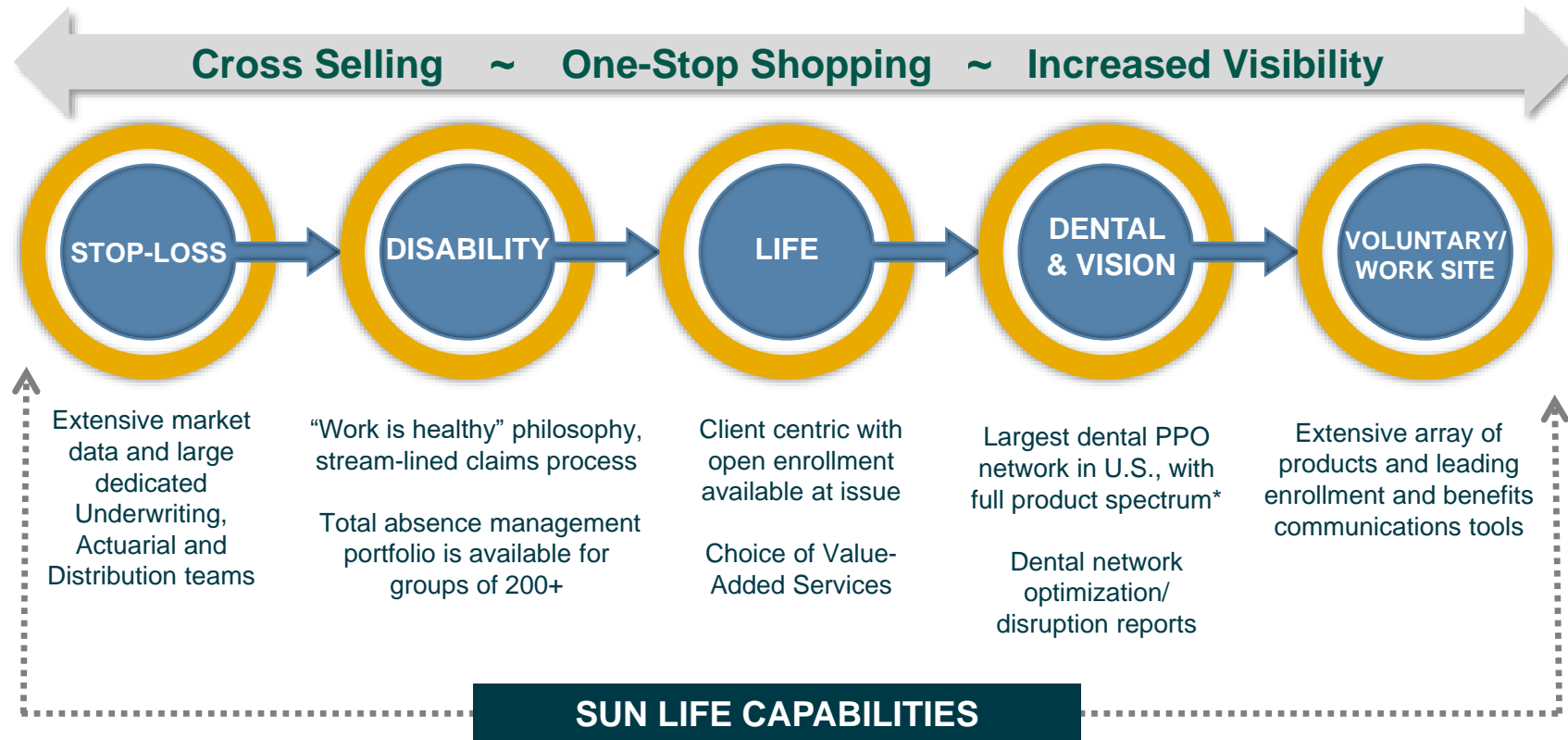
- › Total Cost of Absence Analysis and ROI models
- › Policy review, program design and process improvement
- › Integrated Absence Management and Population Health Strategies
- › Market Analysis, RFP Management, Vendor Selection
- › Project and Implementation Management for outsourced and insourced solutions
- › Data Analytics and Performance Benchmarking
- › Transitional Return to Work Programs
- › Leave and ADA training and communication strategies
- › Compliance updates and best practice recommendations

› **Client Work**

- › Provided Total Cost of Absence Analysis and ROI projections for a large multi-state employer
- › Reviewed end to end internal LOA and ADA process for a national employer; Identified gaps and solutions for improving consistency, compliance and efficiency
- › Conducted comprehensive market review of over 30 Software, TPA and Insurance Carriers for Leave and ADA Solutions
- › Discovery, Vendor selection and implementation of leave management and ADA software tool for a 35,000 employee group
- › Transitioned a large employer from a costly Extended Illness Bank to a managed Short Term Disability and Outsourced Leave of Absence Program
- › Designed and implemented a Transitional Return to Work program
- › Conducted a peer review and provided best practices recommendations for a national employer's integrated leave, disability and paid time off policies
- › Assisted Manager/Supervisors and HR Team with Leave and ADA trainings and communication strategies

BROAD PRODUCT PORTFOLIO

CAPABILITIES THAT PROVIDE KEY BENEFITS



*Dental Network: The Ignition Group, LLC, data as of September 2017 and based on unique dentist count.

Significant Jury Verdicts



Case/court/date/claims	Facts	Jury Award & Damages
<p><u>Martinez v. Rite Aid Corp.</u> California 3/27/2018 ADA</p>	<p>EE of 20+ years subject to transfer and derogatory comments such as “bipolar,” “crazy,” and “psycho” after return from medical leave.</p>	<p><u>\$8,200,000 (1st Trial) 2010</u> <u>\$ 321,000 (2nd Trial 2014)</u> <u>\$6,000,000 (3rd Trial 2018)</u> <i>Add attorneys’ fees</i></p>
<p><u>Ortiz v. Chipotle Mexican Grill</u> California 5/10/2018 Worker’s Comp. retaliation/ADA</p>	<p>General manager of restaurant was fired five days after going on medical leave for work-related injuries to wrists for allegedly stealing \$636.</p>	<p><u>\$7,974,539</u></p> <ul style="list-style-type: none"> • Pain/Suffering \$2,000,000 • Future Medical \$50,000 • Past Wages \$250,000 • Other \$4,000,000 <p><i>Add attorneys’ fees</i> Case settled on eve of trial for punitive damages</p>
<p><u>Coachman v. Seattle Auto Management (d/b/a Mercedes Benz Seattle)</u> Washington 10/11/2018 ADA</p>	<p>Finance director diagnosed with vocal cord cancer who had total laryngectomy/prosthetic voice box fired when tried to return to work after 9 month leave of absence for treatment/surgery – told job filled. ER also argued EE could not perform essential functions because his speech was “indecipherable”</p>	<p><u>\$4,934,060</u></p> <ul style="list-style-type: none"> • Pain/Suffering \$4,697,248 • Past Wages \$236,812 <p><i>Add attorneys’ fees</i></p>
<p><u>DaPrato v. MA Water Resources Authority</u> Massachusetts 3/22/18 FMLA/ADA</p>	<p>EE fired for alleged FMLA abuse/fraud/misconduct because after ER observed video surveillance of EE walking and lifting during FMLA leave for knee surgery/injury</p>	<p><u>\$2,079,700</u></p> <ul style="list-style-type: none"> • Past Wages \$5,435.69 • Pain/Suffering \$200,000 • Front Pay \$300,00 • Punitive Damages \$715,385 • FMLA liquidated damages \$208,443 • Attorneys’ fees \$575,690 • Prejudgment Interest \$60,404

Significant Jury Verdicts



Case/court/date/claims	Facts	Jury Award & Damages
<u>Browett v. City of Reno</u> Nevada 5/8/18 FMLA	EE denied promotion after taking FMLA leave to care for newborn child and for wife recovering from childbirth with serious health condition	<u>\$1,384,812</u> <ul style="list-style-type: none"> • Past Wages \$110,406 • Front Pay \$900,000 • FMLA liquidated damages \$110,406 • Attorneys' fees \$264,000
<u>Duarte v. St. Barnabas Hospital</u> New York 1/26/18 ADA	EE given performance warnings for poor performance. EE terminated for falsifying time sheets. EE had hearing disability. EE alleged manager made harassing comments: "Are you deaf?" "Put that thing on, you're deaf." "I forgot that you are deaf."	<u>\$1,374,000</u> <ul style="list-style-type: none"> • Pain/Suffering \$624,000 • Punitive Damages \$750,000 Add attorneys' fees
<u>Perona v. Time Warner Cable, Inc.</u> 9 th Cir. (CA) 5/24/18 ADA	Jury found ER failed to provide reasonable accommodation and failed to engage in interactive process.	<u>\$1,124, 938</u> <ul style="list-style-type: none"> • \$160,000 compensatory damages • \$964,938 attorneys' fees
<u>Perry v. Isle of Wight County</u> Virginia 4/26/18 FMLA	Failure to reinstate EE to job position after FMLA leave.	<u>\$876,347.66</u> <ul style="list-style-type: none"> • \$747,320.66 damages • \$129,027 attorneys' fees
<u>Baldrige v. Kansas City Public Schools</u> Missouri 4/24/18 ADA	EE (quadriplegic) argued removal of dedicated paraprofessional and slow response to other accommodation requests was evidence of hostile environment. Court of Appeals affirmed – even though providing paraprofessional may not have been legally required in first place.	<u>\$806,075</u> <ul style="list-style-type: none"> • \$230,000 damages • \$576,075 punitive damages Add attorneys' fees

Significant Jury Verdicts



Case/court/date/claims	Facts	Jury Award & Damages
<p><u>D’Onofrio v. Costco Wholesale Corp.</u> Florida 6/11/2018 ADA</p>	<p>Deaf EE fired after asking for accommodation of interpreter and complaining of discrimination. ER had installed video interpreting equipment and brought in expert from advocacy group for hearing impaired to training manager on how to communicate effectively with deaf individuals. ER argued it terminated EE for outbursts at work, throwing objects and shoving co-worker.</p>	<ul style="list-style-type: none"> • \$775,000 • Compensatory damages \$750,000 • Punitive damages \$25,000 <p>Add attorneys’ fees</p>
<p><u>Marshall v. Rawlings Co.</u> KY 3/26/18 ADA</p>	<p>EE w/ bipolar disorder, and PTSD took leave under FMLA and alleged she suffered discriminatory and retaliatory treatment including demotion and termination.</p>	<p>\$687,095</p> <ul style="list-style-type: none"> • \$81,000 back pay • \$75,000 front pay • \$150,000 emotional distress • \$150,000 punitive • \$231,095 Attorneys’ fees
<p><u>Burnett v. Ocean Properties</u> Maine 11/1/2018 ADA</p>	<p>Call center EE who was paralyzed/used wheelchair had repeated issues accessing building due to ice/snow and faulty chair lift. Was sent home one day w/out pay because elevator not working. EE resigned claiming constructive discharge. ER argued EE had chronic lateness and absenteeism.</p>	<p>\$650,000</p> <ul style="list-style-type: none"> • Pain/suffering \$150,000 • Compensatory damages \$150,000 • Punitive damages \$500,000 <p>Add attorneys’ fees</p>
<p><u>Lukachick v. Bridgeport Hospital</u> CT 5/21/2018 ADA</p>	<p>EE had anxiety/depression. EE alleged retaliation for using intermittent FMLA leave. ER suspended EE w/out pay for being too rough with patient and for making disparaging remarks about patient and having verbal confrontation with patient. EE was given progressive discipline and terminated.</p>	<p>\$445,141</p> <ul style="list-style-type: none"> • Pain/suffering \$30,00 • Past wages \$415,141 <p>Add attorney’s fees Judge reduced verdict to \$345,141</p>
<p><u>Wilgus v. Bayhealth Medical Center</u> Delaware 08/2018 ADA</p>	<p>ER did not grant accommodations of registered nurse with back injury to use back-brace on grounds that EE could not perform essential job functions with back brace because she was restricted in squatting</p>	<p>\$296,285</p> <ul style="list-style-type: none"> • Compensatory damages \$196,285 • Punitive damages \$100,000 <p>Add attorneys’ fees</p>

Significant Jury Verdicts



Employer/Date	Facts	Settlement
Cato Corporation (retailer women's fashion) December 2018 ADA & Pregnancy discrimination	<ul style="list-style-type: none"> ER allegedly failed to accommodate pregnant EEs and EEs with disabilities. Allegedly forced EEs to take leaves of absence rather than accommodate 	<ul style="list-style-type: none"> <u>\$3,500,000</u> Revise workplace accommodation policy Conduct training of EEs Report to EEOC for 3 years on responses to requests for accommodations
Nevada Restaurants June 2018 ADA	<ul style="list-style-type: none"> ER had "100% healed" return to work policy Allegedly forced EEs with disabilities, "regarded as" having disabilities or "associated with" someone with disabilities to quit 	<ul style="list-style-type: none"> <u>\$3,500,000</u> 3 year consent decree involving: <ul style="list-style-type: none"> ✓ Retain ADA consultant to review/revise policies. ✓ Conduct training of EEs on ADA ✓ Develop centralized tracking system for EE to report accommodation requests ✓ Submit regular reports to EEOC
Coca-Cola August 2018 ADA	<ul style="list-style-type: none"> 9 charges by EEs that ER did not properly accommodate EEs with disabilities 	<ul style="list-style-type: none"> <u>\$2,250,000</u> Annual financial support to selected nonprofit entities dedicated to helping individuals with disabilities find and keep employment Update policies regarding ADA accommodations/leaves Establish dedicated accommodation and leave management team to assist EEs
Family HealthCare Network December 2018 ADA & Pregnancy discrimination	<ul style="list-style-type: none"> ER allegedly had rigid leave policies and practices that denied reasonable accommodations to disabled and/or pregnant EEs ER allegedly denied additional leave 	<ul style="list-style-type: none"> <u>\$1,750,000</u> 3 year consent decree involving: <ul style="list-style-type: none"> ✓ retaining EEO monitor to review and revise ER's policies ✓ Conduct training about disability and pregnancy discrimination ✓ Develop centralized tracking system to EE requests for accommodations and discrimination complaints ✓ Submit regular reports to EEOC

Significant Jury Verdicts



Employer/Date	Facts	Settlement
Wilmington Trust Corp. December 2018 ADA	<ul style="list-style-type: none"> ER had practice of placing EEs on involuntary leave until released to return to work with no restrictions. One example: EE had walker boot for Achilles tendinitis/bone spurs. ER would not allow her to wear boot at work and put her on leave. 	<ul style="list-style-type: none"> \$700,000 2 year injunction against “no restrictions” policies ER will advise EEs that it is no longer following “no restrictions” policy ER will conduct training on ADA and other statutes enforced by EEOC.
Absolut Health Care October 2018 ADA & pregnancy discrimination	<ul style="list-style-type: none"> Nursing home ER allegedly failed to accommodate disabled EEs, denied leave as reasonable accommodation and had “no restrictions” return policy, and allegedly failed to provide accommodations for pregnancy 	<ul style="list-style-type: none"> \$465,000 3 year consent decree requires: <ul style="list-style-type: none"> ✓ ER to revise leave of absence, discipline and attendance policies to comply with ADA ✓ Train EEs on ADA and Pregnancy Discrimination Act
CA Department of HR October 2018 ADA	<ul style="list-style-type: none"> ER allegedly violated ADA during hiring and medical review process 	<ul style="list-style-type: none"> \$300,000 2 year consent decree requires: <ul style="list-style-type: none"> ✓ Appoint EEO consultant, a medical consultant and EE officer to revise current medical evaluation policies ✓ Prepare a reasonable accommodation policy and appeals process ✓ Provide training to EE on ADA
Estee Lauder July 17, 2018 Gender Discrimination	<ul style="list-style-type: none"> Facially neutral policy found to discriminate. ER provided new fathers less paid leave time for bonding than it provided to new mothers on assumption fathers were secondary care-givers. 	<ul style="list-style-type: none"> \$1,100,000 Consent decree requires: <ul style="list-style-type: none"> ✓ Updated parental leave program ✓ Required Training on unlawful sex discrimination ✓ Included monitoring by EEOC



Significant ADA & FMLA Cases & Agency Guidance



Must FMLA intermittent leave breaks be paid?

- ✓ The DOL said that 15 minute breaks each hour are uncompensated time because they are for EE's and not the ER's benefit.
- ✓ **But** EEs taking FMLA breaks must receive the same compensable breaks as other EEs.

Does a “no-fault” attendance policy violate the FMLA?

- ✓ Under this policy, attendance points for unexcused absences remain on an EE's record for 12 months of “active service” after accrual
- ✓ If EE goes on FMLA leave, the attendance points are “frozen” during the FMLA leave and stay on for 12 months exclusive of FMLA leave period.
- ✓ DOL said policy does not violate FMLA because EE does not lose a benefit.
- ✓ Policy did not assign “attendance points” for FMLA leave absences.

FMLA Cases: Call-in Requirements



Espindola v. Apple King (Ct. App. WA 11/29/18)

- EE had to leave work early and be absent without notice because of pain/issues related to pregnancy.
- ER assessed attendance points and terminated employment.
- Court said that attendance policy did not advise EE of how to report/request unforeseeable FMLA leave.

Hutchinson v. Global Experience Specialists (D. Nevada 12/3/18)

- EE approved for FMLA intermittent leave was terminated for not following instructions to notify certain manager of her absence.
- Instead, she notified co-worker who then notified “designated” manager. ER terminated.
- Court denied summary judgment on FMLA claim because there was evidence that ER was “lenient” about how absences had to be reported.

Keogh v. Concentra Health Services, Inc. (6th Cir. 11/8/18)

- EE was told he needed to contact **3rd party Absence Provider** to request FMLA leave
- He did not do so and court said absences not protected even though he mentioned FMLA leave to manager
- EE did not follow call-in procedures and no “unusual circumstances” to excuse

Brown v. Constellation Brands, Inc. (E.D. CA 10/14/18)

- Court upheld termination of EE who did not notify **3rd party Absence Provider** that absence was FMLA intermittent leave.

Contrast two cases Involving FMLA Intermittent Leave



Krah v. Allegheny County (W.D. PA 9/6/18)

- EEs were required to do mandatory overtime (OT)
- When EEs refused to do OT, they did not get credit for having worked an OT shift
- They would remain at top of rotation for OT.
- Therefore, if EE took intermittent leave to get out of OT, EE would remain at the top of rotation
- Court said policy violates FMLA because EEs were forced to use FMLA time for OT shifts that they would not have been assigned “but for” having taken FMLA intermittent leave

Porter v. Tri-Health (S.D. Ohio 11/2/18)

- EE was required to work a rotating evening shift
- EE advised ER she could not work evening shift and used FMLA intermittent leave to avoid.
- Court said ER does not violate FMLA if it terminates EE who will be unable to return to work at end of FMLA leave – even if termination occurs before end of FMLA period
- EE’s request for FMLA leave is really a request for a permanent schedule change which is not required under FMLA

FMLA – Timing of termination decision is crucial!



Termination Decision made before Leave requested - but delivered after - is not FMLA Violation

- ***Rouse v. Wynn Las Vegas*** (Nevada 11/29/18)
- ***Riley v. Kokomo*** (7th Cir. 11/20/18)
- ***Cumpston v. Central Supply Co.*** (West Virginia 10/5/18)

But: Adverse action shortly after FMLA leave request can be FMLA violation

- ***Leinenbach v. Washington County*** (Oregon 12/11/18)
- ***Borton v. Lowe's Home Center*** (Texas 12/20/18)
- ***Kintz v. Hometown Nursing & Rehab.*** (PA. 10/24/18)

Selecting EE for RIF during FMLA leave?

- ***Stottlemeyer v. Syncreon*** (PA 10/9/18)
 - (no FMLA Violation because ER demonstrated legitimate nondiscriminatory reason for the selection)

FMLA – Interference & Retaliation cases



FMLA violation to deny FMLA leave because still “in process”

Cordova v. State of New Mexico (11/2/18)

- EE told manager he needed to go home because of an “FMLA thing”
- ER told EE he could not go home because FMLA still being processed
- ER terminated EE for leaving.

Posting job while on FMLA is not FMLA violation

Martin v. Home Depot (California 12/11/18)

FMLA creates legal right to reinstatement – merely posting job is not FMLA violation

FMLA – Interference & Retaliation cases



- › FMLA can run during Worker's Compensation leave
- › *Evarts v. Quinnipiac University* (Connecticut 10/4/18)
- › EE was out of work on worker's compensation.
- › EE believed FMLA did not run concurrently and, thus, applied for FMLA two months later when needed surgery
- › ER retroactively designated absences as FMLA leave – Court said this was acceptable
- › Retroactive designation is permissible as long as no prejudice
- › Also: ER did not let EE return to work immediately because of conflicts in medical documentation – Court says ER may delay return and seek clarification

FMLA Cases: Call-in Requirements



Espindola v. Apple King (Ct. App. WA 11/29/18)

- EE had to leave work early and be absent without notice because of pain/issues related to pregnancy.
- ER assessed attendance points and terminated employment.
- Court said that attendance policy did not advise EE of how to report/request unforeseeable FMLA leave.

Hutchinson v. Global Experience Specialists (D. Nevada 12/3/18)

- EE approved for FMLA intermittent leave was terminated for not following instructions to notify certain manager of her absence.
- Instead, she notified co-worker who then notified “designated” manager. ER terminated.
- Court denied summary judgment on FMLA claim because there was evidence that ER was “lenient” about how absences had to be reported.

Keogh v. Concentra Health Services, Inc. (6th Cir. 11/8/18)

- EE was told he needed to contact **3rd party Absence Provider** to request FMLA leave
- He did not do so and court said absences not protected even though he mentioned FMLA leave to manager
- EE did not follow call-in procedures and no “unusual circumstances” to excuse

Brown v. Constellation Brands, Inc. (E.D. CA 10/14/18)

- Court upheld termination of EE who did not notify **3rd party Absence Provider** that absence was FMLA intermittent leave.

What is sufficient notice by EE to trigger FMLA or ADA?



Jackson v. Costco (Montana 10/30/18)

- EE terminated for insubordination after outburst.
- Had previously submitted a RTW letter that referred to unnamed medical condition.
- EE had gone home one day saying “not feeling well.”
- **ADA not triggered:** EE had not put ER on notice of depression and anxiety

Mishak v. Serazin (Ohio 10/30/18)

- EE told manager over the years he had ADHD but did not request accommodation.
- EE was criticized for performance errors but did not attribute errors to ADHD until termination meeting.
- **ADA not triggered:** EE must make clear he is requesting accommodation and doing so because of disability.

Shoemaker v. Alcon Labs. (4th Cir. 8/6/18)

- EE told manager of neck and back pain, headaches, and dizziness
- EE suffered dizzy spell and passed out at work
- EE made mistakes at work and ER fired EE
- **FMLA not triggered:** Knowledge of medical condition was not notice that EE needed medical leave.

Vitti v. Macy's Incorporated (2nd Cir. 12/21/18)

- When hired, EE asked for Wednesdays off
- Later: Scheduling system became automated, and to request special schedule had to follow ADA Accommodation process
- Macy's told her EE needed to file request and she failed to do so.
- **ADA not triggered:** EE did not follow process

What is sufficient notice by EE to trigger FMLA or ADA?



Reed v. PPG Industries (Ohio 11/21/18)

- EE told ER he was absent because of fever, nausea and vomiting but did not tell ER this was caused by urinary tract infection
- **FMLA not triggered:** No notice of serious health condition

Stubenrauch v. Citizens Financial (Michigan 11/26/18)

- EE told ER she needed to leave work early for 2 days per week for physical therapy for back condition.
- ER terminated EE for conduct/performance issue
- **ADA not triggered:** This was not notice of disability.

Thomas v. Imerys Carbonates (Alabama 12/10/18)

- ER told EE to move a sweeper & EE said “I need something to eat”
- ER said no break before you move the sweeper
- ER fired EE for insubordination
- **ADA triggered:** ER knew EE had diabetes and that he had taken breaks for blood sugar before

Marquez v. Glendale Union High School (Arizona 10/9/18)

- EE called in “sick days” daily for 10 consecutive work days
- EE had brain tumor & EE testified she told manager but manager denied
- ER terminated employment
- **ADA not triggered:** EE did not request accommodation – asking for individual sick days is not a request for medical leave
- **FMLA may be triggered:** If jury believes EE told manager of brain tumor – duty to advise EE of FMLA rights would be triggered.

ADA: Is [lifting, walking, etc.] an essential function?



Influencing factor	Case	Yes/No RE essential function?
Was it described in job description?	<i>Kelly v. Department of Human Services (Illinois 11/15/18)</i>	Yes: Job description stated nurse had to be able to handle emergencies, which can involve heavy lifting and pushing.
Was there conflicting language in job description?	<i>EEOC v. Wesley Health System (Mississippi 11/14/18)</i>	No: Job description said nurse must do heavy lifting and pushing but Safety guidelines said nurse should ask for assistance in moving patients. ER admitted nurses used “buddy system”
Was everyone required to do it?	<i>Ammons v. Chicago Board of Educ. (Illinois 9/24/18)</i>	No: Evidence school “turned a blind eye” to requirement that security officers not allowed to sit.
Did this EE actually do it?	<i>Rouse v. Kroger Co. (Georgia 11/16/18)</i>	No: Evidence that store manager delegated lifting to other workers and no one complained and his recent performance reviews showed met/exceed expectations.
Can an accommodation be made to help EE perform essential function	<i>Christensen v. Pacific Pell Telephone (California 11/27/18)</i>	Yes w/accommodation: EE was required to climb telephone poles. ER could provide bucket trucks.

ADA: Direct threat to safety



Must be objective evidence of threat to safety – good faith belief not enough

- **Montgomery v. Union Pacific Railroad Co. (Arizona 11/21/18)**
 - EE's and ER's experts disagreed about whether train operator's condition could result in sudden incapacitation: Jury trial necessary
- **Todd v. Covenant Security Services (Kentucky 12/12/18)**
 - ER required to provide mobility device to security officer to help him perform rounds
 - No evidence that device would cause threat to safety

ER is not required to allow EE to perform responsibilities that conflict with medical documentation

- **Denson v. Steak 'N Shake (8th Cir. 12/3/18)**
- **Elledge v. Lowe's (No. Carolina 12/20/18)**

Must be unbiased process to evaluate safety threat

- **Nall v. BNSF Railway Co. (5th Cir. 12/27/18)**
 - EE was train crew member with Parkinson's disease
 - Comments made that EE was never coming back to work and medical review was being done just to "be nice"

ADA: Various Cases



Medical documentation must support the Accommodation

- ***N'Gouan v. AB Car Rental Services (Colorado 11/26/18)***
 - *EE wanted to work days so he could have dialysis at night.*
 - *No mention of need to work days (or have dialysis at night) in medical documentation*
- ***Stelter v. Wisconsin Physicians Service Ins. Corp. (Wisconsin 11/30/18)***
 - *One doctor's note said a sit-stand desk would "be helpful"*
 - *Follow up doctor's note did not mention desk*

Are temporary impairments covered by the ADA? Maybe?

- ***Austin v. Children's Hospital (Colorado 12/13/18)***
 - *ADAAA loosened the standard*
 - *3 months incapacity from shoulder injury is disability*
- ***Harris v. Universal Logistics (Alabama 11/21/18)***
 - *EE injured hand at work, had surgery and had restrictions while recovering.*
 - *No disability for temporary incapacity*

Extended leave

- ***Winnie v. Infectious Disease Assc. (11th Cir. 11/8/18)***
 - *4 month leave not reasonable accommodation for medical facility that treated life threatening illnesses that needed highly trained nursing staff*
 - *Would cause undue hardship*
- ***Estep v. Forever 21 Retail (Oregon 11/13/18)***
 - *Extended leave of up to one year is not per se unreasonable accommodation*
 - *Refuses to follow *Severson (7th Cir.)**

ADA: Various Accommodations



Telecommuting

- ***Ford v. Synovus Bank (Georgia 12/13/18)***
 - ER did not have to allow telecommuting as accommodation because EE handled confidential financial information and there could be security issues

Job Transfers!

- ***Alexander v. Montana Development (Montana 11/13/18)***
 - ER may have duty to assist EE in search for vacant positions.
- ***Elledge v. Lowe's Home Centers (North Carolina 12/20/18)***
 - EE must complete for job transfer and demonstrate best qualified.

Job Restructuring

- ***Reyazuddin v. Montgomery County, Maryland (4th Cir. 11/21/18)***
 - ER can restructure a job in order to effectively implement an accommodation
 - ER cannot isolate EE or limit an EE's opportunity for job advancement

ADA: Adverse Actions



No claim for failure to accommodate where no “adverse action”

- ***O’Gwnn v. Rutherford County (Tennessee. 11/6/18)***
 - *Demotion with loss of pay is adverse action – even though EE chose to retire rather than accept demotion*
- ***Nolen v. Ohio Department of Rehabilitation (Ohio 12/21/18)***
 - *Transfer to a different shift can be adverse action*
- ***Andrekovich v. Borough of Punxsutawney (Pennsylvania 10/29/18)***
 - *Paid leave is not an adverse action*

No claim for failure to accommodate where no “adverse action”

- ***Stolley v. Board of County Commissioners (10th Cir. 2018)***
- ***Mall v. BNSF Railway Co. (Kansas 11/14/18)***

Be careful about comments in emails!

- ***EEOC v. Mid South Extrusion (W.D. Louisiana 10/18/18)***
 - *Manager made comments about an EE’s coughing fit in an email and expressed concern EE would file for LTD*
 - *Court says is direct evidence of discrimination*
- ***Gilbert v. Kimberly-Clark (E.D. PA 10/25/18)***
 - *Email stating manager wants EE fired – sent at the time EE requested medical leave*
- ***Howard v. Gateway Regional Medical Center (S.D. Illinois 10/30/18)***
 - *Manager’s husband said to EE at party “stop playing the cancer card”*
- ***Tarpley v. City Colleges of Chicago (7th Cir. 10/22/18)***
 - *Negative comments in emails that were mocking EE (“Ha! EE wants to stay. Start reading with the original message, and hope you both are having fun. I did not want to withhold this entertaining turn of events.”)*
 - *Court said comments were not said to EE and EE did not know until after lawsuit brought*

Be Careful with Temporary Employees



- > If you have a temporary employee from a temporary agency, you may be joint employer for purposes of FMLA and ADA

Jiminez v. Chubb & Son (Connecticut 11/30/19)

- Chubb had temporary EE working on site from Kelly Services
- EE submitted request for pregnancy leave under FMLA
- Chubb denied EE raise in pay
- While on pregnancy leave, Chubb communicated performance concerns to Kelly Services about EE
- Chubb replaced EE with someone else during her leave
- EE sued for pregnancy discrimination and FMLA violations
- Chubb argued that claims should fail because it was not the ER.
- Court disagreed – Chubb controlled her work



Statutory Developments/Trends

FMLA Cases: Call-in Requirements



Espindola v. Apple King (Ct. App. WA 11/29/18)

- EE had to leave work early and be absent without notice because of pain/issues related to pregnancy.
- ER assessed attendance points and terminated employment.
- Court said that attendance policy did not advise EE of how to report/request unforeseeable FMLA leave.

Hutchinson v. Global Experience Specialists (D. Nevada 12/3/18)

- EE approved for FMLA intermittent leave was terminated for not following instructions to notify certain manager of her absence.
- Instead, she notified co-worker who then notified “designated” manager. ER terminated.
- Court denied summary judgment on FMLA claim because there was evidence that ER was “lenient” about how absences had to be reported.

Keogh v. Concentra Health Services, Inc. (6th Cir. 11/8/18)

- EE was told he needed to contact **3rd party Absence Provider** to request FMLA leave
- He did not do so and court said absences not protected even though he mentioned FMLA leave to manager
- EE did not follow call-in procedures and no “unusual circumstances” to excuse

Brown v. Constellation Brands, Inc. (E.D. CA 10/14/18)

- Court upheld termination of EE who did not notify **3rd party Absence Provider** that absence was FMLA intermittent leave.

Paid Sick Leave Laws: New Laws in Red



States	Cities	Counties/Districts/ Territories
Arizona California Connecticut Maryland (eff. 2/1/18) Massachusetts Michigan (eff. April 2019) New Jersey (eff. 10/29/18)* Oregon Rhode Island (eff. 7/1/18) Vermont Washington Variations:** Georgia Illinois Maine	California: Berkeley, Emeryville, Long Beach, Los Angeles, Oakland, San Diego, San Francisco, Santa Monica Illinois: Chicago Minnesota: Duluth (adopted 5/2018; eff. 1/1/20), St. Paul (eff. 1/1/18), Minneapolis New York: New York City Pennsylvania: Philadelphia Texas: Austin (enjoined)***, San Antonio (eff. 8/1/19) Washington: Seattle, Spokane, Tacoma	District of Columbia Puerto Rico Montgomery County (MD) Cook County (IL) (ERs can opt out)
		U.S. Government Federal Contractors must provide paid sick leave

*The New Jersey law provides that the state law preempts all local paid sick leave laws. Therefore, effective 10/29/18 paid sick leave laws in the following cities will be preempted: Bloomfield, East Orange, Elizabeth, Irvington, Jersey City, Montclair, Morristown, Newark, New Brunswick, Passaic, Paterson, Plainfield, Trenton.

**Georgia, Illinois & Maine do not mandate Paid Sick leave but require certain ERs who already offer it to allow it to be used for broader purposes

***The Austin, Texas paid sick leave law was enjoined by court order

What are Paid Sick Leave laws?



- › Employers must provide paid sick leave that is available for the following reasons:
 - › Employee's own illness
 - › To care for covered family member who is ill (broader than FMLA)
 - › Siblings; grandparents; in-laws; anyone who is "like family"
 - › To attend routine medical appointments for employee or family member
 - › Sometimes, other reasons such as domestic violence
- › Employers must fund PSL out of payroll at full pay
- › Leave is job protected & no retaliation
- › Many PSL laws forbid requesting doctors' notes until more than 3 consecutive days of absence
- › Can be taken intermittently

Common Sense Compliance with Paid Sick Leave Laws



All of the Paid Sick leave laws have a common provision:

- If the Employer provides PTO that is at least as generous as what law requires, Employer will be deemed in compliance.
- The PTO does not have to be just for “Sick Time” — can be general PTO



Employers should review their PTO policy and make sure that they are at least as generous as what law requires.

- Employers can include provision saying: “If you live or work in a state that has a more generous legal requirement, we will comply with that requirement.”

Paid Family & Medical Leave (PFML) Laws



States	Federal	Proposed legislation
<ul style="list-style-type: none"> • California • Delaware (state EEs only/parental leave only eff. 9/1/19) • Hawaii (disability only) * • Massachusetts (premiums collected 7/1/19 & leaves eff. 1/1/21) • New Jersey • New York • Rhode Island • Washington (premiums collected 1/1/19 leaves eff. 1/1/20) <p>*On 7/5/18, Hawaii Gov. Ige signed law requiring legislature to propose PFL legislation by 9/1/19.</p>	<ul style="list-style-type: none"> • Federal Tax Credit for PFML (sunsets 12/31/19) 	<p style="text-align: center;"><u>US Congress</u></p> <ul style="list-style-type: none"> ➤ Family Act (Gillibrand) ➤ WorkFlex (Mimi Walters) ➤ Econ. Security for New Parents Act (Rubio)
	<p>Cities/Districts/Territories</p>	
	<ul style="list-style-type: none"> • San Francisco (parental leave only) • District of Columbia (premiums collected 7/1/19 leaves effective 1/1/20) • Puerto Rico (disability only) 	

Paid Sick Leave Laws: New Laws in Red



States	Cities	Counties/Districts/ Territories
Arizona California Connecticut Maryland (eff. 2/1/18) Massachusetts Michigan (eff. April 2019) New Jersey (eff. 10/29/18)* Oregon Rhode Island (eff. 7/1/18) Vermont Washington Variations:** Georgia Illinois Maine	California: Berkeley, Emeryville, Long Beach, Los Angeles, Oakland, San Diego, San Francisco, Santa Monica Illinois: Chicago Minnesota: Duluth (adopted 5/2018; eff. 1/1/20), St. Paul (eff. 1/1/18), Minneapolis New York: New York City Pennsylvania: Philadelphia Texas: Austin (enjoined)***, San Antonio (eff. 8/1/19) Washington: Seattle, Spokane, Tacoma	District of Columbia Puerto Rico Montgomery County (MD) Cook County (IL) (ERs can opt out)
		U.S. Government Federal Contractors must provide paid sick leave

*The New Jersey law provides that the state law preempts all local paid sick leave laws. Therefore, effective 10/29/18 paid sick leave laws in the following cities will be preempted: Bloomfield, East Orange, Elizabeth, Irvington, Jersey City, Montclair, Morristown, Newark, New Brunswick, Passaic, Paterson, Plainfield, Trenton.

**Georgia, Illinois & Maine do not mandate Paid Sick leave but require certain ERs who already offer it to allow it to be used for broader purposes

***The Austin, Texas paid sick leave law was enjoined by court order

Paid Family & Medical Leave laws (PFML)



Washington (State) PFML (leaves begin 1/1/20)

- 12 weeks of paid leave for employee's own serious health condition
- 12 weeks of paid family leave
 - Bond with new child
 - Care for family member with serious health condition
 - Qualifying military exigency
- Combined total of 16 weeks of paid Medical & paid Family leave
- Extra 2 weeks paid medical leave if absence because of pregnancy

Massachusetts PFML (leaves begin 1/1/21)

- 20 weeks of paid leave for employee's own serious health condition
- 12 weeks of paid family leave
 - Bond with new child
 - Care for family member with serious health condition
 - Qualifying military exigency
- Combined total of 26 weeks of paid Medical & paid Family leave

› New trend: Merge job protection & income replacement



2018 midterm election results: States to Watch for PFML laws in 2019



State	House control	Senate control	Governor	2019 legislation introduced?
Oregon	Dem.	Dem.	Dem. Kate Brown	Yes
Maine	Dem.	Dem.	Dem. Janet Mills	Yes
Colorado	Dem.	Dem.	Dem. Jared Polis	Not yet -- soon
Connecticut	Dem.	Dem.	Dem. Ned Lamont	Yes
Illinois	Dem.	Dem.	Dem. J.B. Pritzker	Yes
New Mexico	Dem.	Dem.	Dem. Michelle Grisham	Yes
Vermont	Dem.	Dem.	Repub. Phil Scott	Yes
New Hampshire	Dem.	Dem.	Repub. Chris Sununu	Yes
Minnesota	Dem.	Repub. (by 1 vote)	Dem. Tim Walz	Yes

Why ERs still need STD coverage after PFML laws adopted:



Evaluation Issue	Consideration
Statutory PFML laws have benefit caps impacting higher income EEs	The PFML benefits cap out at various income levels (typically \$60,000 to \$70,000). If an EE has higher earnings, the EE may need supplemental STD benefits.
The allotments of paid family leave and paid medical leave are interdependent	<ul style="list-style-type: none">• In WA (for example), if an EE takes 12 weeks of paid family leave, the EE will only be eligible for 4 weeks of paid medical leave in the same year.• EEs would not be adequately protected during an LTD Elimination period without private STD.
Statutory PFML is available intermittently and STD is not.	<ul style="list-style-type: none">• Because statutory PFML can be taken intermittently, an EE could exhaust all available paid leave benefits.• EEs would not be adequately protected without private STD.

Federal Tax Credit for Paid Leave (currently sunsets 12/31/19)



- › Be written In order to qualify for the credit, the employer's Paid Family & Medical Leave benefit MUST:
 - › Policy that offers job protection
 - › Be available for one or more of the FMLA leave reasons:
 - › Employee's own serious health condition
 - › Bonding with new child
 - › Care of family member with serious health condition
 - › Qualifying exigency and/or
 - › Care of injured service-member
- › Pay 50% or more of employee's regular wages for a minimum of 2 weeks
- › Be in addition to PTO (vacation leave, personal leave or sick leave)
- › Be in addition to other statutorily required leaves

Tax credit is only available for EEs earning up to \$72,000!

IRS has issued guidance stating a Short Term Disability Program may qualify for the tax credit!

More and more employers are offering Voluntary Paid Parental and/or Paid Family Leave



- › U.S. is (almost) the only OECD country that does not provide paid parental leave benefits
- › Political support for Paid Family Leave
- › Benefits to employers?
- › Talent attraction
- › Employee retention
- › Improved employee engagement, morale, and productivity
- › Enhanced brand
- › Demographics of millennials:
 - › Millennials are having children and caring for aging baby boomer parents



Employer options?

- Paid parental leave to bond with new child (born, adopted, foster)
- Paid leave to care for an ill family member
- Beware of “maternity leave” policies available only to women: **gender discrimination**
- “Primary caregiver” or “birth mother”

Trends in 2018: Broader Pregnancy Accommodation laws being adopted in more states



› Which states in 2018?

- › Massachusetts (eff. 4/1/18)
- › South Carolina (eff. 5/17/18)
- › Vermont (eff. 1/1/8)

› What is new about these laws?

- › ERs must grant accommodations for pregnancy – even if no complications
- › For some accommodations, ERs may not request medical documentation.

› Example's of accommodations:

- › Sitting
- › More frequent breaks (including bathroom breaks)
- › Schedule changes
- › Telecommuting
- › Leave
- › Light duty
- › Temporary transfer

› States/jurisdictions that already adopted similar laws:

- › CA, CT, DE, D.C., HI, IL, MD, MN, NE, NV, NJ, NY, RI, WA

New trends: Predictive Scheduling Laws



- › Jurisdictions with new laws:
 - › Oregon Fair Workweek Act (eff. 7/1/18)
 - › Philadelphia Fair Workweek Ordinance (eff. 1/1/20)
 - › New York City (eff. 11/26/17) (New York state adopting rules in 2019)
 - › San Francisco
 - › Seattle

New trends: Predictive Scheduling Laws



› General provisions:

- › Typically apply to hourly employees of certain size ERs in retail, hospitality or food services
 - › Includes chains and franchises
- › Require ERs to give new hires a written good faith estimate of work schedule
- › Require 7-14 days prior notice of schedules (shorter notice period for part time EEs)
- › EEs may decline to work hours or shifts not posted in work schedules
- › Extra compensation for changes without advance notice.
 - › Increase in compensation for short notice increase in schedule
 - › Partial compensation for short notice reduction in schedule

New trends: Predictive Scheduling Laws



- › General provisions (cont'd):
 - › Some mandate a certain number of 10 hours rest between shifts)
 - › Some have exemptions for health, safety, weather or circumstances outside ER's control
 - › Some permit unions to negotiate waiver

New trends: Predictive Scheduling Laws



› General provisions (cont'd):

- › Some mandate a certain number of 10 hours rest between shifts)
- › Some have exemptions for health, safety, weather or circumstances outside ER's control
- › Some permit unions to negotiate waiver

New laws in NYC



- › Disability antidiscrimination law which requires cooperative dialogue & reasonable accommodation
 - › Requires employer to provide a written decision of response to request for accommodation
 - › NYC issued lengthy guidance on the law here:
https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.pdf
- › Expansion of antidiscrimination law to cover Protection of family planning, sexual and reproductive health decisions (passed 12/2018; waiting signature by mayor)
 - › Intended to protect women and men from fearing whether their personal health and reproductive choices will risk their jobs
 - › Includes decisions about abortion, in vitro fertilization or treatment of sexually transmitted diseases

New laws in NYC



- › Temporary Schedule change law (eff. 7/18/18)
 - › EEs have the right to request temporary changes to work schedules for personal events
 - › These events include:
 - › Caring for a child under age 18
 - › Caring for a family member who has a disability
 - › Attend a legal proceeding or hearing for public benefits for EE or family member
 - › Any other reason covered by NYC Paid Safe and Sick Leave law
 - › Family member includes an individual whose close associate with EE is equivalent of family
 - › No proof of event required.
 - › ER must respond to request in writing w/in 14 days, including explanation of reason for denial (if denied)
 - › ER cannot punish, penalize, retaliate or take any action against EEs on account of law

State Unpaid Leave law Developments



- › Illinois Service Member Employment and Reemployment Rights Act (USERRA) [eff. 1/1/19]:
 - › Modeled on USERRA but offering expanded definition of military service, mandated special treatment in performance reviews, poster requirement, damages and advocate established

- › CA Parental leave expansion [eff. 1/1/18]:
 - › Expanding 12 week unpaid bonding leave to ERs with 20+ EEs.
 - › Previously available for ERs with 50+ EEs.

State Unpaid Leave law Developments



- › Nevada domestic violence [eff. 1/1/18]:
 - › Protected Time off for victims of Domestic Violence

- › Vermont Crime Victims Leave [eff. 7/1/18]:
 - › Crime victims or family members of crime victims may take leave to attend depositions or court proceedings.



EEOC Issues Final Rules Removing Wellness Incentive Sections Under ADA and GINA:

- › Adopted in 2017, rules provided guidelines on acceptable incentives to offer for EE voluntary participation in Wellness Initiatives
 - › Not enough guidance on extent to which ER can ask for medical information
- › The Wellness Incentive rules were challenged by lawsuit [AARP v. EEOC] as being arbitrary and capricious
 - › Court ordered EEOC to revise them.
- › EEOC has decided to remove wellness incentive sections under the ADA and GINA effective 1/1/19.

Thank you for the opportunity to present to you today!



Brycie Repphun
Brepphun@tpgrp.com



Marjory Robertson
Marjory.Robertson@sunlife.com



Abigail O'Connell
Abigail.oconnell@sunlife.com



THE
PARTNERS
GROUP

Total Absence Management