

Sage Abra HRMS

# Navigating the Mine Field of Federal and State Leave Laws

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



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# Your Presenter for Today

Mary Anne Osborne, SPHR  
The Osborne Group

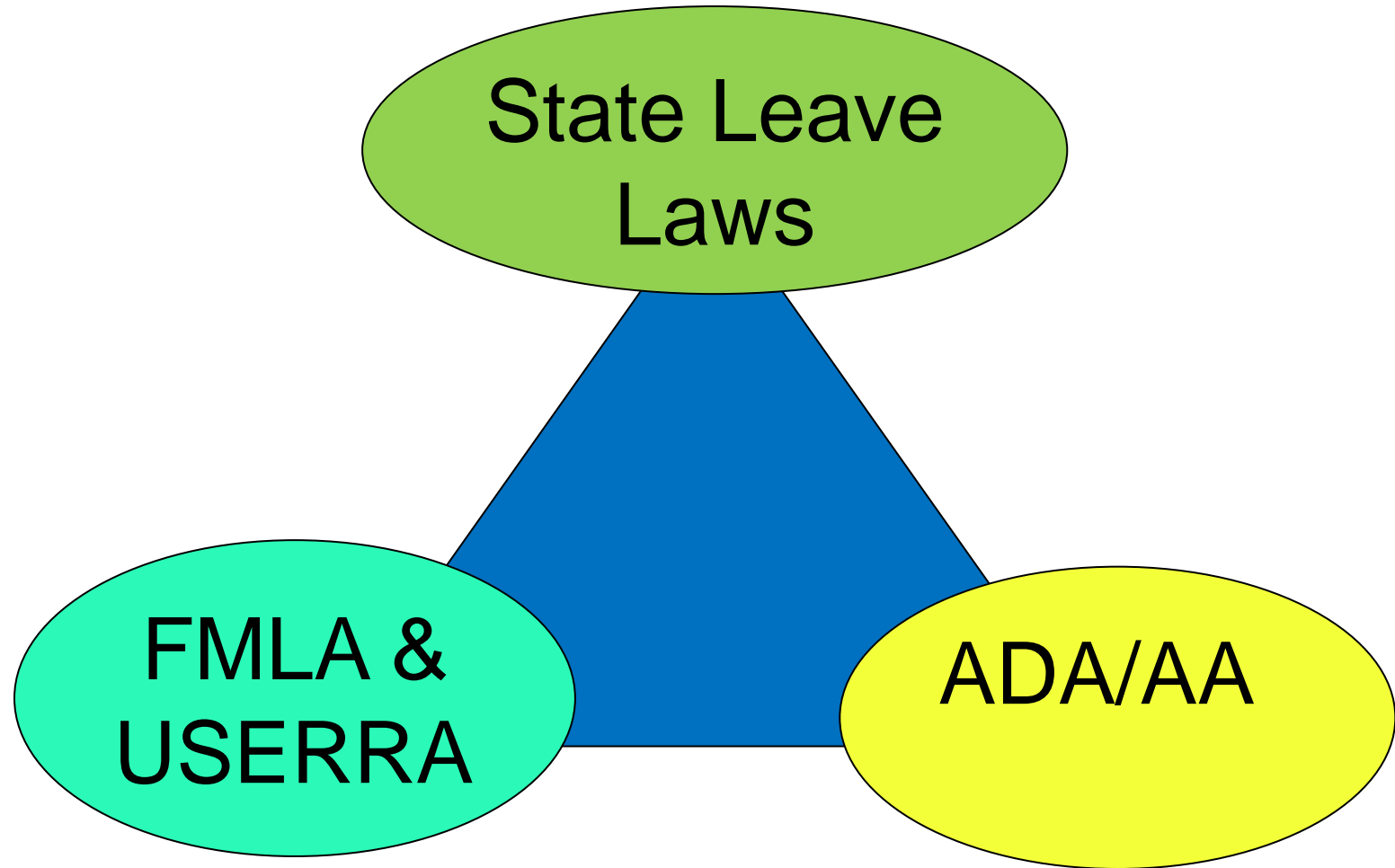
- Over 25 years of HR experience in Telecom, Financial, Manufacturing, Healthcare and Higher Education arenas
- People-centric HR Professional
- Award winning
- Business, Customer Service and Quality focused



# 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



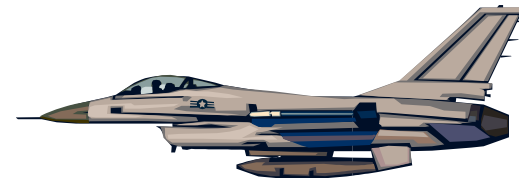
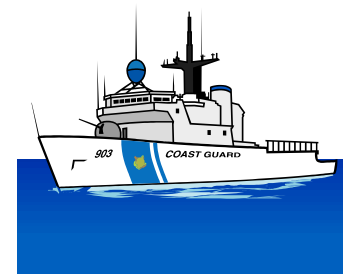
# Uniformed Service Employment Re-Employment Rights Act (USERRA) 1994

- **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 2<sup>nd</sup> 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 4<sup>th</sup> 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 2<sup>nd</sup> or 3<sup>rd</sup> 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

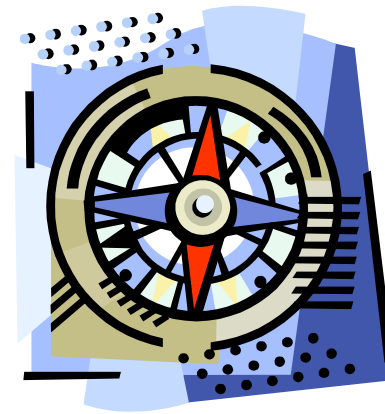
# Map Out Your Strategy

- 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?



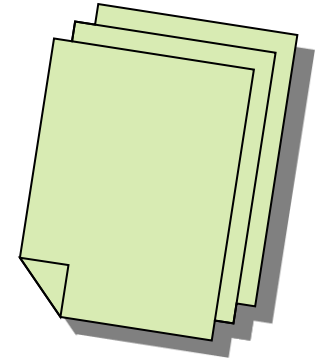
# Tools for Navigating the Mine Field

- 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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