

Bringing Collaboration to the Forefront

# FMLA Liability & Risk Management Solutions for Catholic Dioceses

Rob Larson – UNUM Kevin Cooksey – GBS Dallas





# Agenda

- Bringing Collaboration to the Forefron
- FMLA Overview
- Employer obligations under FMLA
- State Leave Protections
- The Legal environment
- FMLA Outsourcing options
- Unum Absence Management
- Questions





- \* Rob Larson is an FMLA expert with UNUM responsible for sales and service of national account customers. He partners with employers, brokers, & consultants to build Integrated Absence Management programs which reduce overall absence, improve productivity, and ensure compliance with Federal & State leave regulations. He also conducts education programs for FMLA, Absence Management, Long Term Care, and Disability Integration.
- \* **Kevin Cooksey** is a Health & Welfare Consultant in the Gallagher Benefit Services office located on Dallas, TX. Kevin has 18 years experience managing all aspects of benefit plans for Catholic Dioceses, and currently serves of the Senior Leadership team for the Religious & Nonprofit Practice Group.





# FMLA Quiz

Do the following situations meet criteria for a job protected leave under the FMLA?

#### Yes or No?

- ❖ Jane Green's daughter, Amanda, has a chronic asthma condition. Amanda's condition does not necessitate a need for her to remain home from school.
  - ➤ **Answer:** No unless Jane is required to accompany Amanda for periodic doctor's appointments or treatments.
- Marcus Doe is receiving treatment for substance abuse on an out-patient basis.
  - Answer: Yes, as long as all FMLA conditions are met and treatment is administered by a health care provider or by a provider of health care services on the referral by a health care provider. Absence due to the use of the substance would not be protected.
- Since she became pregnant, Ms. Marceau has experienced severe morning sickness and is occasionally absent from work.
  - Answer: Yes, any period of incapacity due to pregnancy meets the criteria. In addition, some state leave laws may provide additional benefits due to pregnancy.
- James has a 28 year old son with Down Syndrome. The son resides with James and his wife. James has requested leave to care for his son who is suffering from a serious health condition.
  - Answer Yes, under the FMLA, an adult child who is incapable of self care qualifies as a "child".



# FMLA Quiz

Do the following situations meet criteria for a job protected leave under the FMLA? **Yes or No?** 

- Bonnie Beauty was preparing for her 35<sup>th</sup> high school reunion and had liposuction requiring multiple outpatient treatments with a physician.
  - Answer: No Under these circumstances, the treatments would be considered as cosmetic in nature. Cosmetic treatments or surgery do not qualify unless they require inpatient hospital care or unless medical complications develop.
- Sheba Vee requested a leave to care for her grandmother with cancer who is hospitalized. Sheba's grandmother raised her as a child.
  - Answer: Yes because Sheba Vee's grandmother raised her "in loco parentis", Sheba's grandmother is considered a covered family member under the FMLA. In addition, some state leave laws cover grandparents.
- Mary's elderly mother has Alzheimer's. Her nursing home is closing their Alzheimer's wing so Mary has requested leave to locate another care facility.

Answer – Yes, arranging care for a qualifying family member is a covered reason for leave under the FMLA.



## **FMLA Overview**

How did we get here?

- ❖ FMLA: August 5, 1993
- Regulations effective April 6, 1995
- Request for Information December 2006
- National Defense Authorization Act (military leaves) effective January 28, 2008
- Notice of Public Rule Making February 2008
- New regulations effective January 16, 2009
- Family Military Leave Amendments effective October, 2009





# **FMLA-Regulatory Context**

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**ERISA-Notification/Tolling** 

ADA-Job Accommodation/
Protection

HIPPA-Privacy

#### **FMLA**

- Employer notification requirements
- Employer prohibitions
- Medical information privacy

- 3 key aspects of the regulations:
  - Creates an absolute entitlement for the employee
  - Entitlement to the same health benefits as if still working
  - Entitlement to be reinstated to the same or equivalent position upon return from leave



# **Employer Obligations**

#### An Employer must, within predetermined time frames:

- Evaluate Eligibility for leave
  - Hours worked
  - Location
  - Tenure
  - Employee Status
- Calculate Entitlement for leave
  - How much time available
  - Coordination with state leave laws
  - \*
- Determine Qualification of leave (What is the leave <u>Event</u> reason?)
  - Meet the definition of a serious health condition or military leave entitlements through review of employee provided medical certification or information
  - Meet the definition of non-medical leaves
  - Applicable state leave laws
  - \*\*
- **Confirm in writing (Evidence):** 
  - **Within 5 business days of notice for leave:** 
    - Determine Eligibility
    - Provide Rights and Responsibilities
  - Within 5 business days of receipt of information:
    - Designation of leave





### Which employers must provide FMLA leave?

#### **Private Sector:**

❖ 50 or more employees for at least 20 weeks in the current or preceding calendar year.

#### **Public Agency:**

\* Employer includes "public agency". All public agencies covered regardless of the number of employees, but watch that employees still must meet eligibility requirements including 50 employees within a 75 mile radius.





### **Location rule**

- Must employ 50 or more employees within a 75 mile radius of the site where the requesting employee works.
- Larger multi-site employers may be required to provide coverage in some locations but not others.
- For mobile workers, look to office where they report.
- This determination is made when employee gives notice of the need for leave.





## **Methods for Calculating FMLA Leave**

#### **Fixed year Method:**

- ❖ Under the fixed 12-Month Period method, an eligible EE can take up to 12 weeks leave at any time within the fixed 12-month period selected. Employer can select one of the following:-
  - > The Calendar year.
  - Any other 12-Month period.

#### **Rolling Forward Method:**

❖ Under the forward method, an EE's 12-Month period starts on the day the EE's first FMLA leave begins and ends 12 months later. The EE can take 12 weeks of FMLA leave during that 12-month period. The EE's next 12-month period begins the first time he/she takes FMLA leave after completing the previous 12-month period.

#### **Rolling Backward Method:**

Under the backward method, an EE's 12-month period is measured backward from the date an EE uses any FMLA leave. Every day an EE takes FMLA leave (including intermittent leaves); he/she is entitled to any remaining balance of the 12 weeks of leave that has not been used during the immediately preceding 12-month period.

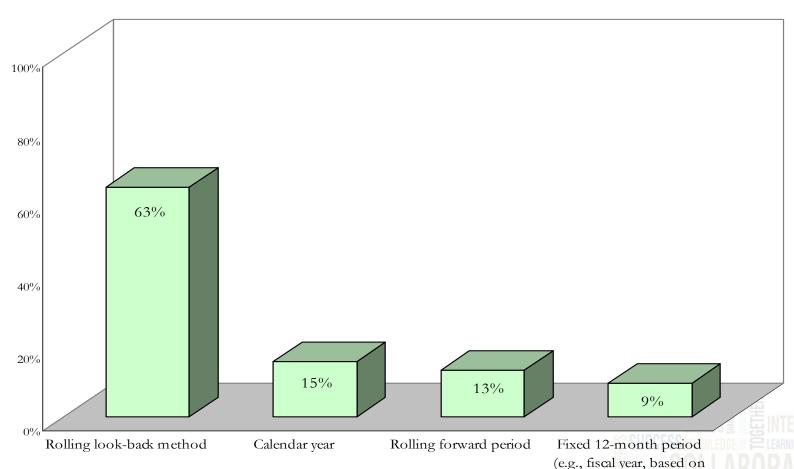


## Calculation Method by Employers

date of hire)

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#### Methods Used to Track Leave



Source: International Foundation for Employee Benefits, 2006 Employer FMLA Study



### Which employees can take FMLA leave?

- Been employed for at least 12 months.
  - ❖ Does not need to be consecutive, employment prior to a break in service of more than 7 years should not be counted except in certain circumstances.
  - Any week in which employee is maintained on the payroll counts (including weeks when no work is performed).
- Has worked at least 1,250 hours during the 12 consecutive months prior to the leave begin date.
  - Only actual work time counted.
  - \* Leaves of absence, paid or unpaid, including FMLA leave, not counted.
  - Pursuant to USERRA, employees returning from military service shall be credited with hours that would have been performed <u>but for</u> the military service.
  - \* Time worked as a temporary employee counts.





### Under what circumstances may an employee take leave?

- \* Birth of a child, to care for newborn child.
- Placement of a child for adoption or foster care.
- \* To care for a spouse, child, or parent with a <u>serious health condition</u>.
- \* Because of the employee's own <u>serious health condition</u> that makes the employee unable to perform the functions of the job.
- Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or impending call) in support of a contingency operation.
- In addition, may take leave for up to a total of 26 weeks to care for a covered service member with a serious injury or illness.





## **Care for Loved Ones**

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- Spouse
  - Husband or wife as defined by state law. Excludes same sex marriages due to DOMA
  - Includes common law marriage
- Son or daughter
  - \* Biological child
  - Adopted or foster child
  - Legal ward
  - Any child employee has day-to-day responsibility for (both practical care and financially)
  - ❖ Under 18, or incapable of caring for herself due to mental or physical disability at the time FMLA leave is to commence.
- Parent
  - Biological or adopted parents
  - Includes in-laws, grandparents, or step-parents, if that individual acted as a parent to the employee when he/she was a child
- You can request documentation- but proceed with care!



### **Serious Health Condition (examples)**

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- Allergies
- Asthma
- Alzheimer's disease
- Diabetes
- Epilepsy
- Mental illness
- Restorative/plastic surgery after an injury
- Removal of cancerous growths
- Stroke
- Substance abuse
  - \* Remember: applies to employee or loved one

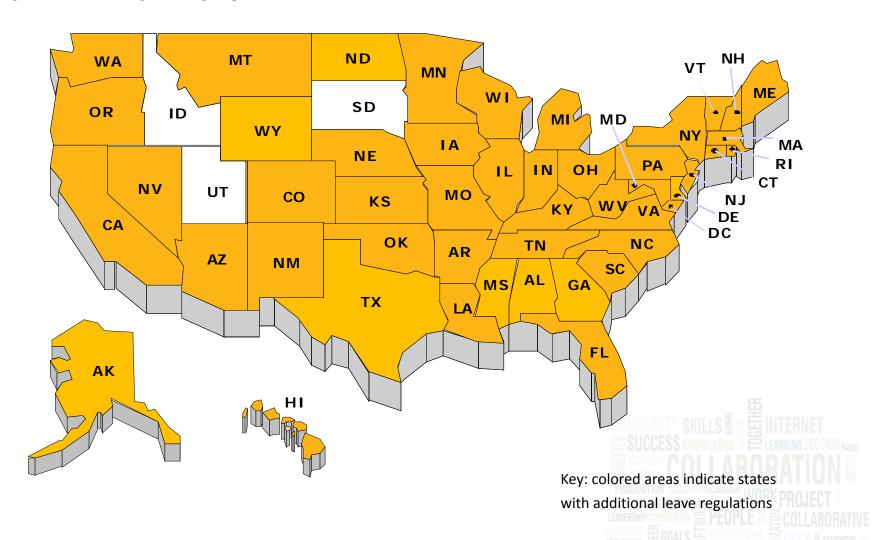




### **States with Leave Protection Laws**

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### Scope and complexity of the law





## **State Leave Law Examples**

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- FMLA like Leave Laws (including family military)
- Pregnancy disability
- Bonding
- Bone marrow/organ/blood donation
- Volunteer Fire Fighters (Emergency workers)
- School Activities Leave Laws
- Domestic Violence/Crime Victim Leave Laws
- Accrued paid leave laws (e.g. CA Kin Care)





## **Common Employer FMLA Violations**

- 1. Failure to identify and promptly designate FMLA-qualifying absences. It is up to the employer to notify the employee.
- 2. Failure to notify employees of their FMLA rights and obligations.
- 3. Failure to educate management about the FMLA regulations.
- 4. Failure to administer state leave laws correctly in conjunction with the FMLA.
- 5. Failure to calculate leave entitlement in workweeks correctly.
- 6. Failure to understand that the FMLA can apply even if employees don't specifically say, "I need FMLA leave".
- 7. Failure to track FMLA entirely because more generous paid leave benefits are provided.
- 8. Counting FMLA leave against employee's absenteeism policy for disciplinary purposes.
- 9. Failure to grant leave to provide physical or psychological comfort.
- 10. Failure to reinstate to same or equivalent job.



## The Risk of non-compliance

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Failing to comply with the law can be costly.

Managers can be held personally responsible for violations.

Companies can be faced with expensive legal fees and settlement fees.

#### The Case:

In Schultz v. Advocate Health and Hospitals Corp., a long-time employee alleged his former employer terminated him in retaliation for using FMLA to care for his two ill parents.

The employee took intermittent leave over several months and during this period began having problems with his supervisors who established performance standards he was unable to meet. The problem escalated until the employee was terminated.

#### The Result:

A federal jury awarded \$11.65 million to the employee. The award consisted of \$10.75 million against the employer and \$900,000 individually against the two supervisors.<sup>1</sup>

<sup>1</sup> Schultz v. Advocate Health and Hospitals Corp., N.,D. III., No. 01 CV 702, 10/30/02.



## The Risk of Non-compliance

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The Case: Dotson v. Pfizer\*. The Plaintiff, Dotson was seeking to adopt a child from Russia and took intermittent time off to attend to the adoption, taking two trips to Russia. The employee kept his employer informed and spoke to his HR Dept. After returning from Russia with the child, the employee was terminated based on an alleged violation of company policy. Dotson sued for FMLA retaliation. The employer argued that the employee was not entitled to FMLA protection because he failed to indicate that he needed FMLA leave. The court rejected this argument, noting that an employee does not have to expressly sate that he needs FMLA or use any magic words to trigger the employer's obligation.

The Result: A jury found for the employee and awarded him over \$1M. The employer appealed but the court affirmed the decision in the employee's favor. The court also held that the lower court erred when it failed to award the employee prejudgment interest, making the judgment even larger than that awarded by the jury.

\*2009 Dotson v. Pfizer, No. 07-1920 (4th Cir. March 4, 2009)



## **Assorted – Recent DOL changes**

- Physician assistants added to list of HCP
- Can waive cause of action without court supervision or DOL approval.
- Employee must pay associated certification costs to avoid benefit premium repayment
- If benefit coverage lapses during leave, must be reinstated without condition upon return





# 2 Unum: Experience and Expertise

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#### Unum US is ranked:1

Group disability insurance
Individual disability insurance
Group long term care insurance

Voluntary benefits

#<mark>4</mark> Group life

#### Highlights

- 34 years as the industry leader in group and individual disability insurance<sup>2</sup>
- Provided insurance benefits for 37% of the Fortune 500³
- More than 25 million covered individuals<sup>4</sup>
- Paid nearly \$6 billion in benefits<sup>5</sup>
- Managed more than 400,000 new claims<sup>6</sup>
- Provided benefits for
   170,000 employers worldwide<sup>7</sup>

1 Leadership rankings for disability: JHA 2009 U.S. Group & Individual Disability Market Surveys, 2010, based on inforce premium; Ranking for group LTC: LIMRA, 2009 Group Long-Term Care Insurance, 2009 New Business and In Force, 2010 (inforce cases). Excludes Federal Group LTC and CalPERS plans as they are not actively sold in the market. Ranking for voluntary benefits: Eastbridge, U.S. Worksite Sales Report Carrier Results for 2009, April 2010. Based on inforce premium; Ranking for group life: JHA, Group Life Market Surveys, 2010 (inforce cases). 2 JHA U.S. Group and Individual Disability Market Surveys, 1997-2008, released in 2009. Ranked #1 in disability insurance for the 21 years prior to 1997 by the annual survey of the Employee Benefits Research Institute (EBRI). 3 Fortune magazine 2009, and Unum customer data, 2009. This statistic includes Unum US, Unum UK and Colonial. 4,5,6,7 Unum internal data, 2009. These statistics do not include Colonial or Unum UK.



### **Unum's FMLA / Absence Management Expertise**

### **Managing Employer Leave Events since 2000**

#### **Customers**

271 Employers (as of February 2012)

#### **Covered Employees**

1,200,000 leave-eligible employees

#### Resources

- 195 Staff, 12 Managers/Consultants
- Dedicated legal team of attorneys / paralegals
- Dedicated medical team of 4 RN's

#### **FMLA and State Leave volumes**

Monthly volume of over 12,000 new managed leave events

#### **Value-added Features**

Web-based leave notification, updates, tracking and reporting





### **Unum: Integrated FMLA / STD Customer Block**

### **Top FMLA Industries at Unum**

Industry	# of Customers	# of FMLA Lives
Manufacturing	66	227,000
Hospitals / Healthcare	36	292,000
Finance / Legal / Prof. Services	35	74,000
Transportation	15	115,000
Oil / Gas / Utilities	10	41,000
Food & Beverage	10	135,000

#### **Common STD Plan Designs Integrated with FMLA**

#### **Advice to Pay**

Unum administers employer's Salary-Continuance / Sick-leave programs

#### **Self-insured**

Unum administers STD benefit payment: Employer self-funds through ASO

#### **Fully Insured**

Traditional STD Plan (Employer paid or Voluntary)



# FMLA leave management

# We can implement a leave management program tailored to your company, which can:

- Consistently administer leave in compliance with all applicable regulations
- Provide integrated intake, management and reporting of federal and state leave
- 3. Systematically track and report all family/medical leave
- 4. Operate as an extension of your HR department providing constant communication with you and your employees
- 5. Provide to your employees written documentation of leave requests and periodic re-certification of leave periods as required by law
- Provide a suite of web-based operational and analytical reports on family/medical leave
- 7. Contain an indemnification clause



### **FMLA/Leave Management Services**

#### **Consistency is vital**

- our system ensures reliable and accurate service
- Proprietary software platform integrates short term disability and FMLA leave requests, verifies eligibility based on federal and state law and corporate policies
- Requests managed uniformly from department to department and state to state

#### Convenience is key

- we make filing and reporting easy
- One toll-free number and one intake system simplify the process for your employees
- Process encourages prompt notification of leave requests

**Employee calls** Unum's telephonic intake STD/FMLA Intake **FMLA** STD Integrated Reporting **Employer** 



## FMLA/Leave Management Reporting

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#### Communication is essential - we keep employers and employees informed



Daily Absence Report. This report shows all updates or modifications to FMLA leave data (not all fields are shown here). If there were no activity triggers on an open leave, the leave would not show up on the daily report. Examples of activity triggers include first reports of leave, changes in leave dates, changes in FMLA / State leave status, intermittent days reported and return to work confirmations. The report may also be scheduled on a weekly basis to reflect cumulative changes in the prior week.

Review Period: 02/01/2005

It is imperative recipients of these reports recognize the sensitive nature of the claim detail they contain and handle them with the same discretion as other confidential human resource documents

Report Group	Leave Number	Report Reason	Last Name	First Name	Leave Requested Date	Reason	Туре	Intermittent Hours
00000000005-5	0000123444-1	IntTime	Sample	Shirley	01/04/2005	PARENT	Intermittent	01/28/2005,06:00:00 AM_02:30:00 PM;8.00
0000000005-5	0000124444-1	IntTime	Sample	Dorris	01/26/2005	EE HEALTH	Intermittent	01/26/2005,07:00:00 AM_03:30:00 PM;8.00
0000000005-5	0000123332-1	Date, RTW DT, Status	Sample	Anedra	01/21/2005	EE HEALTH	Full	
0000000007-7	0000128888-1	Date	Sample	Vincent	01/27/2005	EE HEALTH	Full	
0000000010-10	0000126666-1	Date, RTW DT	Sample	Ronald	01/19/2005	NEWBORN/PATERNITY	Full	
0000000018-18	0000125555-1	Date, Status	Sample	Debra	01/12/2005	EE HEALTH	Full	
00000000027-27	0000117777-1	Date, RTW DT	Sample	Dawn	12/28/2004	PREGNANCY-RELATED	Full	
00000000027-27	0000127777-1	Status	Sample	Dawn	01/20/2005	NEWBORNMOTHER	Full	
0000000031-31	0000199966-1	Date, Status	Sample	Donna	01/26/2005	EE HEALTH	Full	
0000000031-31	0000199966-2	Date, Status	Sample	Donna	01/26/2005	EE HEALTH	Full	
0000000031-31	0000127994-1	Date	Sample	Goerge	01/21/2005	EE HEALTH	Full	
0000000031-31	0000888845-1	RTW CF, RTW DT	Sample	Nicole	01/14/2005	PREGNANCY-RELATED	Full	
0000000048-48	0000888819-1	Date, New Request, Status	Sample	Denise	01/27/2005	EE HEALTH	Full	
0000000054-54	0000666364-1	Date, Status	Sample	Linda	01/06/2005	EE HEALTH	Full	
0000000054-54	0000133359-1	Date, New Request	Sample	Melissa	01/31/2005	EE HEALTH	Full	
0000000054-54	0000555510-1	Status	Sample	Lilie	01/13/2005	CHILD	Intermittent	
0000000059-59	0000557636-1	Status	Sample	Angel	01/05/2005	EE HEALTH	Reduced	
0000000059-59	0000199953-1	Status	Sample	Elias	01/07/2005	EE HEALTH	Intermittent	01/31/2005,05:15:00 PM_07:00:00 PM;1.75
0000000059-59	0000447454-1	IntTime	Sample	Donna	12/30/2004	EE HEALTH	Intermittent	01/30/2005,07:30:00 AM_06:30:00 PM;10.00
00000000061-61	0000117226-2	Date	Sample	Susana	12/30/2004	EE HEALTH	Intermittent	
00000000061-61	0000456823-1	Date	Sample	Leslie	01/06/2005	EE HEALTH	Full	·
00000000061-61	0000456823-2	Date, Status	Sample	Leslie	01/06/2005	EE HEALTH	Intermittent	
0000000065-65	0000127972-1	New Request	Sample	Jennifer	01/27/2005	EE HEALTH	Intermittent	·
0000000065-65	0000117132-3	IntTime	Sample	Sandra	12/29/2004	EE HEALTH	Intermittent	01/31/2005,12:30:00 AM_09:00:00 PM;8.00
0000000065-65	0000117555-2	Date, IntTime, Status	Sample	Diana	12/30/2004	EE HEALTH	Intermittent	01/31/2005,12:30:00 AM_01:30:00 PM;1.00
0000000066-66	0000117777-2	Status	Sample	Sandra	12/31/2004	EE HEALTH	Intermittent	

Total Leaves: 26

Date Run: 02/01/2005 Data as 0f: 01/01/2005

Selection Criteria: Report Wilzard - ; Party(s) - 0000123456;

- Provide daily reports on status of new leave requests
- Monitor changes in leave dates or return-to-work dates
- Track all recorded intermittent leave hours
- Summarize FMLA and short term disability claims in weekly integrated reports



- ❖ For intermittent leaves, the health care provider must certify that the leave is medically necessary.
- Unum will require probable frequency of episodes, if known.
- Unum will require estimated treatment schedules, if known.
- Unum will determine whether the time off is used for treatment or recurring episodes and work with you on next steps if abuse is suspected.
- ❖ Intermittent leave will be reported and deducted from an employee's entitlement in the amount of time actually missed – down to the minute.
- ❖ Provide reported intermittent leave dates and start/end times to you in a daily activity report.



## **FMLA Services Indemnification**

Our FMLA service agre	and Unum. If a judgment is	
made against	as a result of an error solely attributable to Unum, we will indemnify	for that judgment.

#### **SECTION 8. INDEMNIFICATION**

Service Provider agrees to indemnify and hold Employer harmless from any and all liability, loss, damage, fine, penalty or cost (including expenses and reasonable attorneys fees) sustained by Employer which is the result of Service Provider's negligence, gross negligence, willful misconduct, or breach, violation or failure to comply with the express terms and conditions of this Agreement, unless such negligence, gross negligence, willful misconduct or breach, violation or failure to comply was the result of or arose out of Employer's breach violation or failure to comply with the express terms and conditions of this Agreement. Employer agrees to indemnify and hold Service Provider harmless from any and all liability, loss, damage, fine, penalty or cost (including expenses and reasonable attorneys fees) sustained by Service Provider which is the result of Employer's negligence, gross negligence, willful misconduct or breach violation or failure to comply with the express terms and conditions of this Agreement, unless such negligence, gross negligence, willful misconduct or breach, violation or failure to comply was the result of or arose out of Service Provider's breach violation or failure to comply with the express terms and conditions of this Agreement.

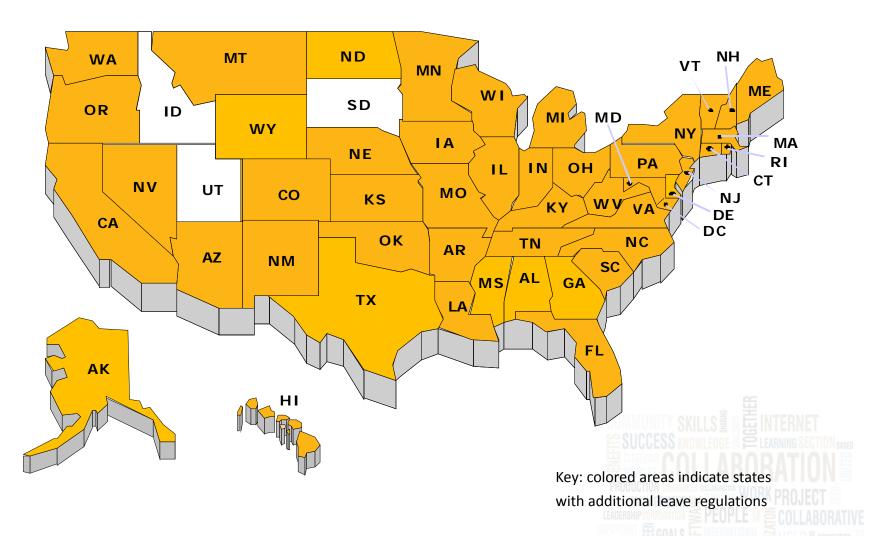
Further, Employer agrees to indemnify and hold Service Provider harmless from any and all liability, loss, damage, fine, penalty, or cost, (including expenses and reasonable attorneys fees) sustained by Service Provider which is the result of or arises out of Service Provider's performance of Services hereunder that are in accordance with and/or based on Employer's directions, to the extent that such directions differ from FMLA and State Leave Laws, regulations and authoritative guidance. Employer agrees to indemnify and hold harmless from any and all liability or loss, damage, fine, penalty, or cost (including expenses and reasonable attorney's fees) sustained by Service Provider which is the result of or arises out of any Historical Data or lack of Historical Data regarding employees prior leaves provided by Employer.



## **State Leave Compliance – 160 laws**

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### Scope and complexity of the law





## FMLA/Leave Management Services

#### The return on investment

- Improve productivity
  - Only eligible and protected leaves are approved
  - Enhanced monitoring of lost time
  - Detailed reporting and tracking
- Decrease administrative costs
  - Minimize the need for administrative personnel resources for training, record-keeping and employee/supervisor questions
- Reduce legal expenses
  - Limit the need for in-house or external legal resources





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# FMLA Liability & Risk Management Solutions for Catholic Dioceses

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