



# 2012 Convocation

*Bringing Collaboration to the Forefront*

## **FMLA Liability & Risk Management Solutions for Catholic Dioceses**

*Rob Larson – UNUM*

*Kevin Cooksey – GBS Dallas*



- ❖ 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.





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 in-patient 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.



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

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



## 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 Event 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.





## 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:

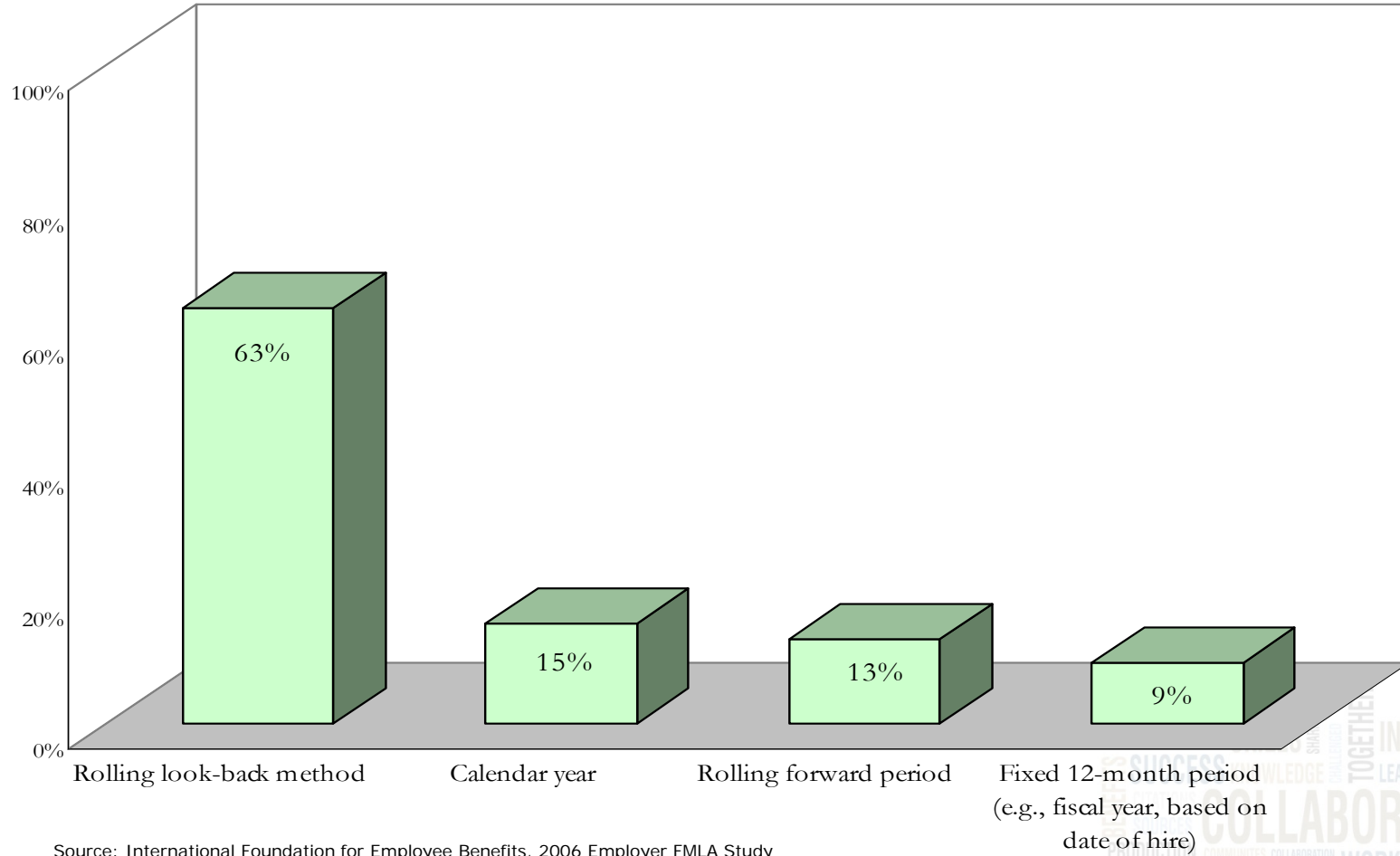
- ❖ Under the forward method, an EE's 12-Month period starts on the day the EE's first FMLA leave begins and ends 12 months later. The EE can take 12 weeks of FMLA leave during that 12-month period. The EE's next 12-month period begins the first time he/she takes FMLA leave after completing the previous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

## Rolling Backward Method:

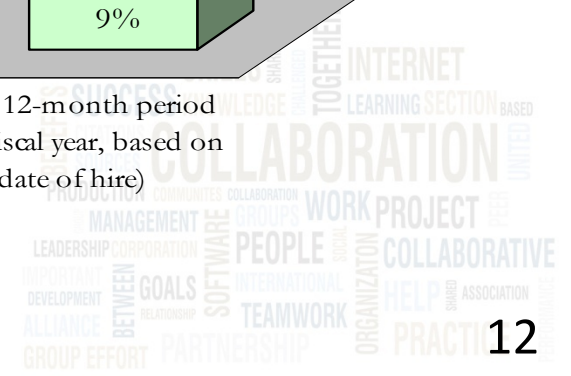
- ❖ Under the backward method, an EE's 12-month period is measured backward from the date an EE uses any FMLA leave. Every day an EE takes FMLA leave (including intermittent leaves); he/she is entitled to any remaining balance of the 12 weeks of leave that has not been used during the immediately preceding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

# Calculation Method by Employers

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 but for 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 serious health condition.
- ❖ Because of the employee's own serious health condition 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.





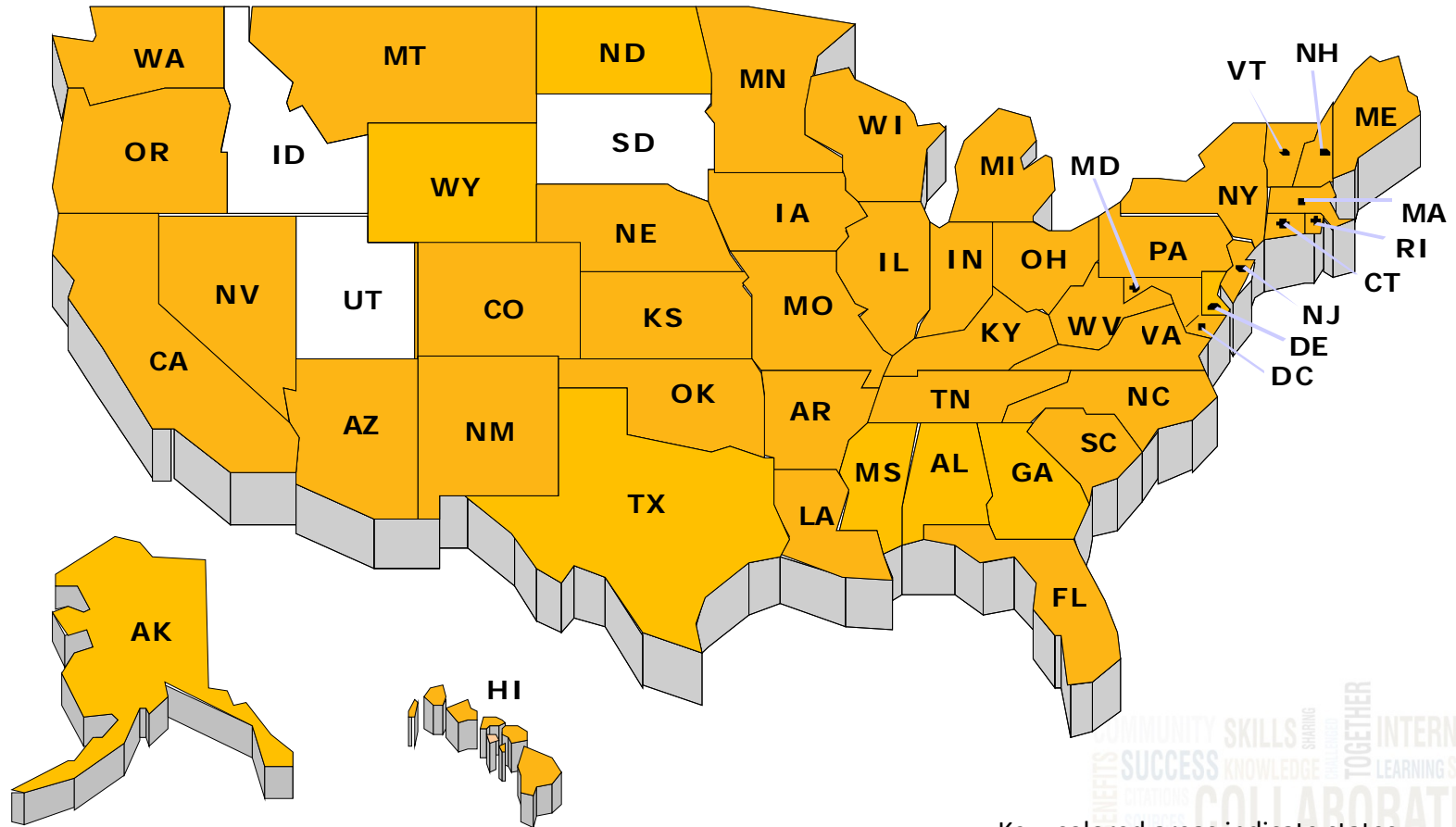






## States with Leave Protection Laws

*Scope and complexity of the law*



Key: colored areas indicate states with additional leave regulations











# The Risk of Non-compliance

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:** 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 state 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 (4<sup>th</sup> Cir. March 4, 2009)



- ❖ 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





## Unum US is ranked:<sup>1</sup>

**#1** Group disability insurance  
 Individual disability insurance  
 Group long term care insurance

**#2** Voluntary benefits

**#4** 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 500<sup>3</sup>
- 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.





## 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

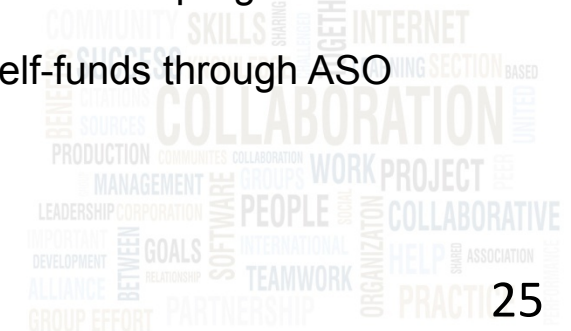
- Unum administers employer's Salary-Continuance / Sick-leave programs

### Self-insured

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

### Fully Insured

- Traditional STD Plan (Employer paid or Voluntary)







## Consistency is vital

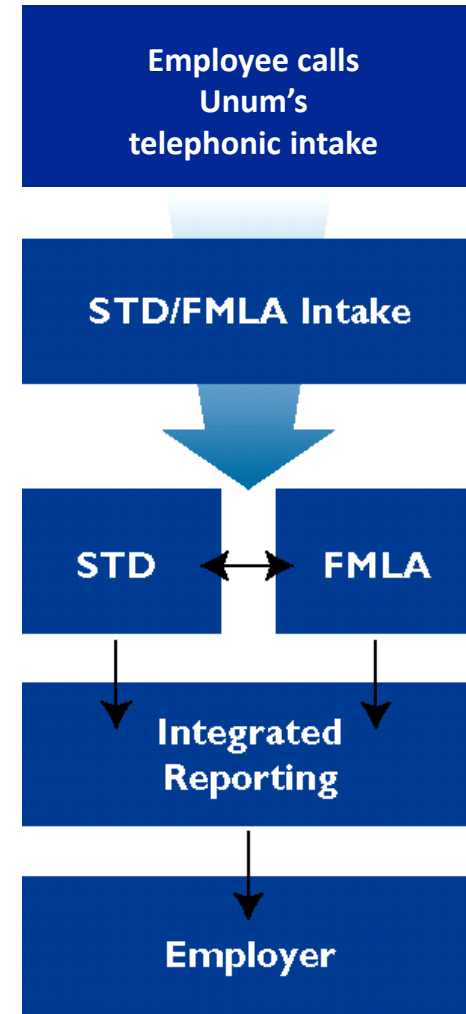
— our system ensures reliable and accurate service

- 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



## 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.



Daily Absence Report  
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	Type	Intermittent Hours
0000000005-5	0000123444-1	InfTime	Sample	Shirley	01/04/2005	PARENT	Intermittent	01/28/2005,06:00:00 AM_02:30:00 PM;8.00
0000000005-5	0000124444-1	InfTime	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	Anebra	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	Deltra	01/12/2005	EE HEALTH	Full	
0000000027-27	0000117777-1	Date, RTW DT	Sample	Dawn	12/28/2004	PREGNANCY-RELATED	Full	
0000000027-27	0000127777-1	Status	Sample	Dawn	01/20/2005	NEWBORN/MOTHER	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	George	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	Lillie	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	InfTime	Sample	Donna	12/30/2004	EE HEALTH	Intermittent	01/30/2005,07:30:00 AM_06:30:00 PM;1.00
0000000061-61	0000117226-2	Date	Sample	Susana	12/30/2004	EE HEALTH	Intermittent	
0000000061-61	0000456823-1	Date	Sample	Leslie	01/06/2005	EE HEALTH	Full	
0000000061-61	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	InfTime	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, InfTime, 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 of: 01/01/2005

Selection Criteria: Report Wizard - ; Party(s) - 0000123446;

- 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





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# Intermittent FMLA Leave Management

- ❖ 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.

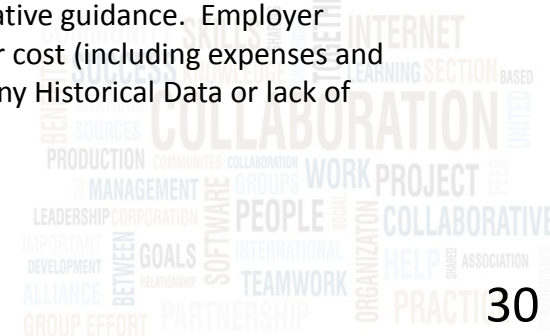


**Our FMLA service agreement contains the following indemnification wording to protect \_\_\_\_\_ and Unum. If a judgment is made against \_\_\_\_\_ as a result of an error solely attributable to Unum, we will indemnify \_\_\_\_\_ for that judgment.**

## **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.

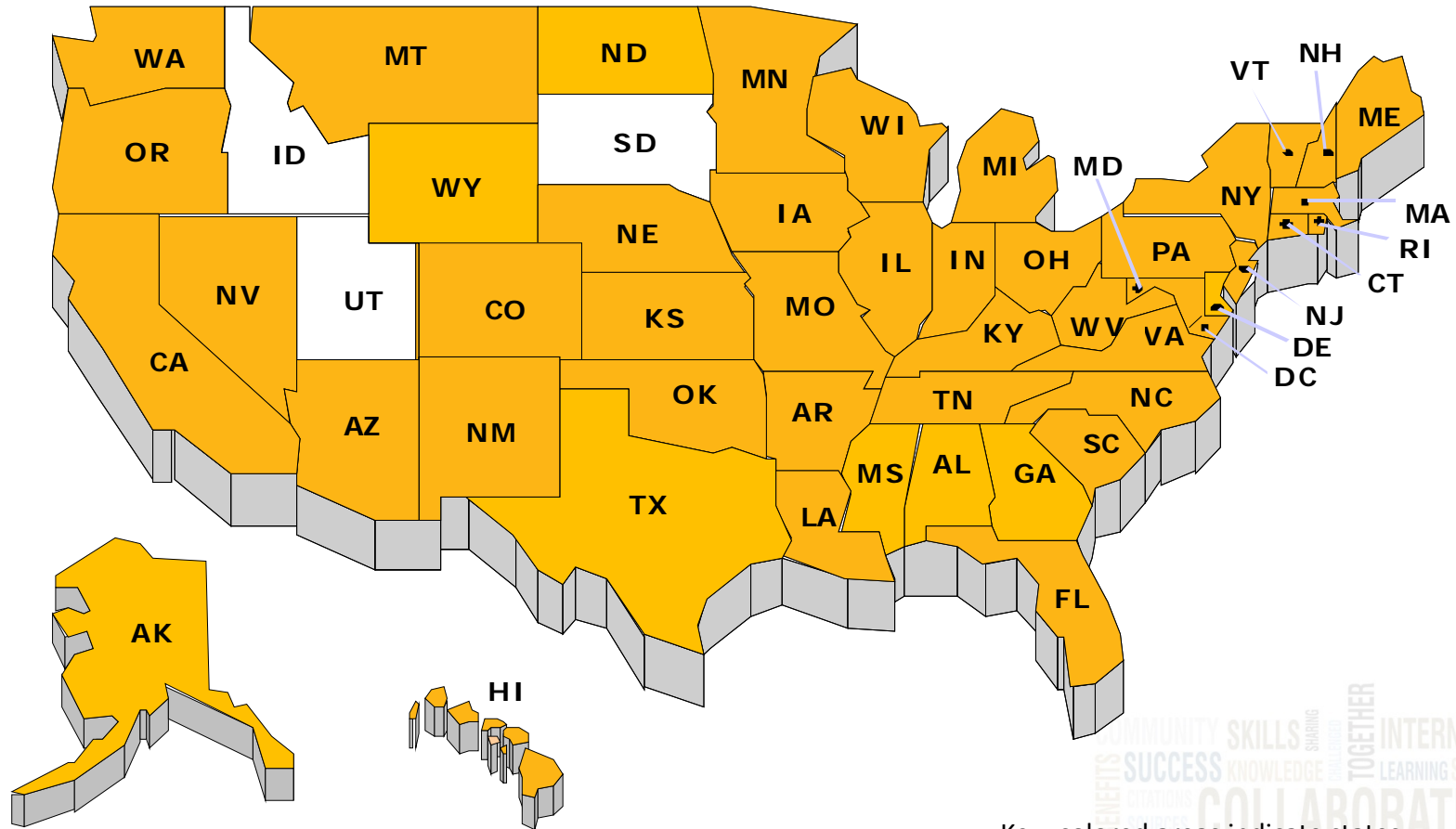
Further, Employer agrees to indemnify and hold Service Provider harmless from any and all liability, loss, damage, fine, penalty, or cost, (including expenses and reasonable attorneys fees) sustained by Service Provider which is the result of or arises out of Service Provider's performance of Services 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

### Scope and complexity of the law



Key: colored areas indicate states with additional leave regulations











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