



Absence and Disability Management Policies



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ABSENCE AND DISABILITY MANAGEMENT POLICIES

Each year, workers in the United States miss more than half a billion work days. Employee absenteeism, or frequent absence from the workplace, can take on numerous forms, and can be caused by a number of factors—from serious illness or injury to low levels of staff morale. Managed ineffectively, employee absenteeism can decrease workplace productivity and increase operating costs. Employers can address the causes and mitigate the impact of employee absenteeism by implementing effective absence and disability management policies. This policy brief provides background information on employee absenteeism and its causes, a baseline review of relevant federal and state policies and links to additional resources.

BACKGROUND

Employee absenteeism includes absences incurred due to:

- ➔ Short-term illness or injury;
- ➔ Long-term illness or serious injury; and
- ➔ Persistent lateness or any sort of unauthorized leave.

Absenteeism can be influenced by factors external to the workplace, including transportation and caregiving responsibilities.

Absenteeism can also be caused or aggravated by factors within the workplace, including low morale; communication problems among employees, supervisors and coworkers; and excessively authoritarian management styles. Research documents that there is a strong correlation between poor engagement by managers and supervisors with their employees and absenteeism. These same workplace factors can do more than just exacerbate absenteeism and underutilize talented workers. As the Harvard Business Review [reported](#) in January 2018, “People don’t quit a job...they quit a boss.”

Public and private employers have a significant financial incentive to develop effective absence and disability management policies. Studies by the U.S. Census Bureau and the Bureau of Labor Statistics estimate the direct financial losses due to absenteeism to be more than \$40 billion a year, and additional research suggests that if illness and injury-related absenteeism were a line item on a company’s profit and loss statement, the cost would probably exceed 15 percent of profits.

The terms “absence management” and “disability management” refer to two management strategies for addressing absenteeism. Absence management and disability management include a common set of goals through different—and sometimes overlapping—strategies. The common goals of absence and disability management include:

- ➔ Develop career enhancement/leadership development opportunities including reviewing employee development programs to ensure that no barriers exist for people with disabilities.
- ➔ Educate employees with disabilities about the importance of the IDP and encourage their managers to work with employees to complete them.
- ➔ Develop, implement and track the number of employees who complete IDPs and enroll in mentoring programs.
- ➔ Improving the competitive condition of the organization;

- ➔ Achieving a healthier, more productive workforce by reducing absenteeism and the occurrence and impact of disability among the labor force;
- ➔ Reducing the cost of medical care, disability benefits and hiring and training new employees;
- ➔ Shortening the time of absence and workplace disruption;
- ➔ Enhancing morale by valuing diversity; and
- ➔ Improving morale by implementing disability rights and family and medical leave policies consistent with federal and state laws and implementing regulations.

In general, “absence management” is targeted at controlling uninformed, unscheduled or excessive absenteeism. Efficient absence management involves striking a balance between providing genuine support to employees who have physical impairments, mental impairments or other health issues or who are performing caregiving responsibilities and, at the same time, taking action against employees who abuse or violate employer policies and procedures.

“Disability management,” meanwhile, focuses on preserving an individual’s ability to participate competitively in the work environment by minimizing the impact of physical or mental impairments resulting from on- or off-the-job injury, disease or illness. Disability management includes a proactive process aimed at reducing the magnitude and number of illnesses or injuries; minimizing the impact of disabilities on work; and decreasing lost time associated with injuries, illnesses and resulting disabilities.

The remainder of this brief provides an overview of federal and state policies that impact the implementation of absence and disability management strategies and provide links to critical resources. Topics addressed include:

- ➔ Alternative and flexible work arrangements;
- ➔ Family and medical leave laws (federal and state);
- ➔ Disability rights laws mandating the provision of reasonable accommodations, including leave; and
- ➔ Workplace health and wellness and employee assistance programs.

The topics of **stay-at-work and return-to-work** (SAW/RTW) are inexorably related to absence and disability management. However, because these topics are so significant in their own right, they are **not** discussed below; rather, SAW/RTW is extensively addressed elsewhere on the [EARN website](#) and on the U.S. Department of Labor’s Office of Disability Employment Policy (ODEP) [website](#).

MANAGING ALTERNATIVE/FLEXIBLE WORK ARRANGEMENTS

Companies that provide alternative and flexible work arrangements (FWAs) produce documented positive effects on their business. Alternative and flexible work arrangements include arrangements that provide workers with options to work less or to have more discretion over when, where and how their work is done. More specifically, they provide flexibility in the:

- ➔ Scheduling of hours worked (e.g., through alternative work schedules such as flex time and compressed workweeks, or through flexible or individualized arrangements regarding shift and break schedules);
- ➔ Number of hours worked (e.g., through part-time work and job shares); and
- ➔ Place of work (e.g., through teleworking or other arrangements that allow employees to work at home or at a satellite location).

Research has shown that there is a considerable business case for offering alternative and flexible work arrangements, particularly as it relates to absenteeism. According to one recent study on work-life programs, alternative work arrangements are one of the most effective tools for reducing/curbing unplanned absences from work. Other studies have yielded similarly encouraging findings, which include the following:

- ➔ Employees with access to FWAs tend to be more satisfied, committed and engaged with their jobs, which leads to increased innovation, quality, productivity and market share.
- ➔ Employers who provide employees with FWAs and time off to take care of personal and family needs are able to limit unscheduled absences.
- ➔ Employees using FWAs report less work-life stress, and, as a result, have fewer unscheduled absences and increased productivity.

For additional information about alternative and flexible work arrangements, you may want to review the following resources:

- ➔ [ODEP Website: Flexible Work Arrangements](#): This website links to additional resources, including:
 - [ODEP-funded Flexible Work Arrangement Resources](#)
 - [Other Flexible Work Arrangement Resources](#): An index of resources, including several focused on FWAs as a strategy for increasing the employment of people with disabilities.
 - [Telework Basics](#): Telework gives employees more control over their schedules and greater flexibility in meeting personal and professional responsibilities. It also offers freedom from office distractions, reduces work-life stress and provides an alternative workplace arrangement in case of emergencies.
- ➔ [U.S. Office of Personnel Management \(OPM\) Handbook on Alternative Work Schedules](#)
- ➔ [OPM Labor-Management Relations: Law and Policy Resources: Negotiating Flexible and Compressed Work Schedules](#)
- ➔ [OPM Telework.gov Website](#)
- ➔ [AskEARN.org Workplace Flexibility Webpage](#)

MANAGING FEDERAL AND STATE FAMILY AND MEDICAL LEAVE LAWS

Compliance with rapidly changing state and federal family and medical leave laws is a major challenge for employers. This section describes the key components of these laws and provides links to informative resources.

FEDERAL LAWS

Family and Medical Leave Act

The [Family and Medical Leave Act \(FMLA\)](#) provides certain employees with up to 12 weeks of unpaid, job-protected leave per year. It also requires that their group health benefits be maintained during the leave. FMLA is designed to help employees balance their work and family responsibilities by allowing them to take reasonable unpaid leave for certain family and medical reasons. It also seeks to accommodate the legitimate interests of employers and promote equal employment opportunity for men and women.

FMLA applies to all public agencies, all public and private elementary and secondary schools and companies with 50 or more employees. These employers must provide an eligible employee with up to 12 weeks of unpaid leave each year for any of the following reasons:

- ➔ For the birth and care of the newborn child of an employee;
- ➔ For placement with the employee of a child for adoption or foster care;
- ➔ To care for an immediate family member (spouse, child or parent) with a serious health condition; or
- ➔ To take medical leave when the employee is unable to work because of a serious health condition.

Employees are eligible for leave if:

- ➔ They have worked for their employer for at least 12 months;
- ➔ They have worked at least 1,250 hours over the past 12 months; and
- ➔ They work at a location where the company employs 50 or more employees within 75 miles.

Whether an employee has worked the minimum 1,250 hours of service is determined according to Fair Labor Standards Act (FLSA) principles for determining compensable hours or work. Time taken off work due to pregnancy complications can be counted against the 12 weeks of family and medical leave.

For additional information about FMLA, you may want to review the following resources:

- ➔ [Department of Labor \(DOL\) FMLA Information](#)
- ➔ [DOL Wage and Hour Division FMLA Information](#)

Federal Paid Family and Medical Leave Tax Credit

The [Tax Cuts and Jobs Act of 2017](#) provides a tax credit to employers that voluntarily offer paid family and medical leave to employees. [Under new Section 45S](#) of the Internal Revenue Code, employers that voluntarily offer qualifying employees up to 12 weeks of paid family and medical leave annually pursuant to a written policy may claim a tax credit for a portion of the wages paid during leave. The leave benefit must satisfy the requirements in Section 45S. A qualifying employee is one who has been employed by the employer for at least one year and is paid no more than

60 percent of the “highly compensated employee” dollar amount on an annual basis (i.e., \$72,000 for 2018). The credit sunsets at the end of 2019, unless reinstated by Congress. Further, the credit does not apply if paid leave is mandated by state or local law.

To qualify for the tax credit under the Act, the employer’s paid family and medical leave benefit must be available for any one or more of the following reasons outlined in the FMLA:

- ➔ 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.

For additional information about the Federal Paid Family and Medical Leave Tax Credit, you may want to review the following resources:

- ➔ [Section 45S Employer Credit for Paid Family and Medical Leave IRS FAQs](#)
- ➔ [How the Employer Credit for Family and Medical Leave Benefits Employers](#)

The Uniform Services Employment and Reemployment Rights Act

The [Uniformed Services Employment and Reemployment Rights Act \(USERRA\) and implementing regulations](#) guarantees an employee returning from military service or training the right to be reemployed at their former job (or as nearly comparable a job as possible) with the same benefits. USERRA applies to virtually all employers, regardless of size, including the Federal Government.

Information about USERRA is available on the internet. DOL’s [USERRA Advisor](#) answers many of the most frequently asked questions about the law. USERRA related [Guides and Briefings](#) can also be found on the DOL Veterans’ Employment and Training Service (VETS) website.

STATE AND LOCAL LAWS

Brief overviews of key family and medical leave laws are outlined below. For more information, visit the National Conference of State Legislatures (NCSL) [State Family and Medical Leave Laws microsite](#).

Family Leave: As explained above, the FMLA provides up to 12 weeks of unpaid leave during a 12 month period to care for a newborn, adopted or foster child; to care for a family member; or to attend to the employee’s own serious medical or health condition. The law applies to private employers with 50 or more employees. The FMLA also allows states to set standards that are more expansive than the federal law and many states have chosen to do so. States with their own family leave laws include California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington and Wisconsin, as well as the District of Columbia. Most of these state laws have expanded either the amount of leave available or the classes of persons for whom leave may be taken.

Paid Family Leave: Four states — California, New Jersey, New York and Rhode Island — currently provide for paid family leave. Washington, DC enacted a paid family leave measure in February 2017 that will take effect on July 1, 2020. The state of Washington passed a measure to create a paid family leave program in July 2017. Benefit payments will commence at the start of 2020.

The paid leave programs in California, New Jersey, New York and Rhode Island are administered through pre-existing temporary disability insurance programs and funded via employee payroll deductions. Washington, DC created a Universal Paid Leave Implementation Fund that will receive monies from a payroll tax on the employees of covered employers and self-employed individuals who opt into the program. The state of Washington created a similar Family and Medical Leave insurance account in the state treasurer's office. (See NCSL's [Paid Family Leave Resources page](#) for more details.)

Paid Sick Leave: Ten states and Washington, DC currently require paid sick leave. Connecticut was the first state to require private sector employers to provide paid sick leave to their employees, with a law enacted in 2011. California became the second state to enact paid sick requirements, with the passage of the Healthy Workplace, Healthy Families Act of 2014. Massachusetts was the third state to require paid sick leave, as voters there approved the Earned Sick Time for Employees ballot measure during the 2014 general election. The Oregon Legislature enacted a law during the 2015 session, and the Vermont Legislature did so during the 2016 session.

During the 2016 general election, voters in Arizona and the state of Washington approved ballot measures requiring employers to provide paid sick leave. The Rhode Island Legislature was the only state to pass a paid sick leave law in 2017, which took effect in July 2018. The Maryland Legislature overrode a gubernatorial veto of paid sick leave legislation in January 2018; the law took effect the next month. New Jersey enacted a mandatory paid sick leave law on May 2, 2018, which will go into effect October 29, 2018.

There are no federal laws that require employers to provide paid sick leave for their employees. (See NCSL's [Paid Sick Leave page](#) for more details.)

School/Parental Leave: A small number of states provide for a limited number of hours annually for parents to attend school-related events and activities for their children: California/40 hours, DC/24 hours, Illinois/8 hours, Louisiana/16 hours, Massachusetts/24 hours, Minnesota/16 hours, North Carolina/4 hours, Rhode Island/10 hours and Vermont/12 hours. Nevada makes it unlawful to terminate an employee for using leave to attend a child's school-related activities.

MANAGING LEAVE AS A REASONABLE ACCOMMODATION UNDER DISABILITY RIGHTS LAWS

Title I of the Americans with Disabilities Act (ADA) prohibits discrimination against a "qualified individual on the basis of disability" and defines such discrimination to include "not making reasonable accommodations to the known physical ... limitations of an otherwise qualified individual with a disability" unless the employer demonstrates "undue hardship." The ADA incorporates the concept of reasonable accommodation into the definition of qualified: it defines "qualified individual" as someone who "with or without reasonable accommodation, can perform the essential functions" of the job the individual holds or desires. Similarly, Section 501 of the Rehabilitation Act, which applies to federal departments and agencies, and Section 503 of the Rehabilitation Act, which applies to contractors doing business with federal departments and agencies, prohibit discrimination on the basis of disability and incorporate

by reference the standards for defining discrimination specified in the ADA, including the standards applicable to reasonable accommodation.

The [regulations](#) implementing Title I of the ADA do not define “reasonable accommodation,” but instead provide a non-exhaustive list of what “reasonable accommodation” may include. This list includes adjusting work schedules, restructuring jobs by modifying nonessential functions and reassigning an employee to a vacant position. Although “leave” is not included in the regulations as an example of “reasonable accommodation,” ample and longstanding authority has held that in appropriate circumstances, a temporary leave of absence can be a reasonable accommodation under the ADA.

Most forms of accommodation (e.g., modifying the setting in which an employee performs a job or re-assigning nonessential responsibilities that an employee cannot perform) are assessed while the employee is receiving the accommodation, when they require it. The accommodation of leave is an exception to this norm in that the relevant inquiry is whether the employee would be able to perform the essential job functions at the end of the leave, if the time off were granted.

The Equal Employment Opportunity Commission (EEOC) identifies leave as a potential accommodation in the Appendix to the ADA regulations as well as in the Reasonable Accommodation Enforcement Guidance. For more information, see:

- ➔ [29 C.F.R. Pt. 1630, App. § 1630.2\(o\)\(2\)](#) (“...other accommodations could include ... providing additional unpaid leave for necessary treatment...”)
- ➔ [EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](#) (“Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee’s disability.”)

Furthermore, the ADA’s legislative history specifically mentions that “[r]easonable accommodation may also include providing additional unpaid leave days, if such provision does not result in an undue hardship for the employer.” (See: [H.R. Rep. No. 101-485, Part 2.](#))

In [U.S. Airways, Inc. v. Barnett](#), 535 U.S. 391, 401-06 (2002), the Supreme Court explained how to evaluate requests for reasonable accommodation under the ADA. The employee who seeks a reasonable accommodation “need only show that an ‘accommodation’ seems reasonable on its face, i.e., ordinarily or in the run of cases.” “Once the plaintiff has made this showing,” the Court stated, “the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.” Put another way, the employee must show only that the accommodation, “at least on the face of things,” would be “feasible” for the employer or that the accommodation was “plausible,” after which the employer must come forward with evidence establishing undue hardship.

Applying *Barnett*, leave is widely recognized as a facially feasible or plausible form of accommodation under the ADA. In particular, leave generally is reasonable where it is of definite, time-limited duration, requested in advance and likely to enable the employee to perform the essential job functions when they return. Not every leave request will satisfy these general characteristics. EEOC has noted, for example, that, while “employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration” which

“can impose an undue hardship on an employer’s operations.” (See: [EEOC Fact Sheet: The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, Question 21.](#))

The ADA provides that an employer need not make a reasonable accommodation if it “can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business.” The ADA thus places the burden of proof for this issue with the employer. The ADA defines the term “undue hardship” as: “an action requiring significant difficulty or expense,” when considered in light of such factors as “overall financial resources of the facility” involved; impact of the accommodation on “the operation of the facility”; overall size and financial resources of the business; and “type of operation.”

For additional information about ADA and leave policy, you may want to review the following resources:

- ➔ [EEOC Fact Sheet on ADA, FMLA and Title VII of the Civil Rights Act](#)
- ➔ [Job Accommodation Network \(JAN\) Accommodation and Compliance: Leave](#)

MANAGING WORKSITE HEALTH AND WELLNESS (ASSISTANCE, EDUCATION AND WELL-BEING PROGRAMS)

Work-life is the business practice of creating a flexible, supportive environment to engage employees and maximize organizational performance. Work-life programs are critical management tools designed to maintain an excellent, engaged workforce. Key work-life programs include:

- ➔ Worksite Health and Wellness Programs
- ➔ Employee Assistance Programs

WORKSITE HEALTH AND WELLNESS PROGRAMS

The leading causes of death and disability in the U.S. are not only preventable but also responsive to workplace interventions. Worksite health and wellness programs help employees modify their lifestyles and move toward an optimal state of wellness. They can also produce organizational and employee benefits, such as lower healthcare costs, increased productivity, improved recruitment and retention, reduced absenteeism and presenteeism and enhanced employee engagement.

Worksite health and wellness interventions include, but are not limited to, health education, nutrition services, lactation support, physical activity promotion, screenings, vaccinations, traditional occupational health and safety, disease management and linkages to related employee services. Employers can develop and sustain programs that address the current and future needs of their employees to produce the healthiest possible workforce.

For additional information about health and wellness programs, you may want to review the following resources:

- ➔ [OPM Health and Wellness Information](#)
- ➔ [EEOC Employer Wellness Programs Regulations](#)

**It should be noted that in December 2017, the judge in the [AARP v. EEOC](#) case vacated the incentive limits established by EEOC for employer wellness plans and ordered the agency to submit its first progress report on a redraft of the wellness incentive rules by March 2018. The court also ordered the EEOC to propose new rules by August 31, 2018. On March 30, 2018, the EEOC filed the status update, which says that, at this time, the agency has no

plans to issue new wellness regulations by a specified date as instructed by the court.

EMPLOYEE ASSISTANCE PROGRAMS

An Employee Assistance Program (EAP) is a voluntary, confidential program that helps employees (including management) work through various life challenges that may adversely affect job performance, health and personal well-being to optimize an organization's success. EAP services include assessments, counseling and referrals for additional services to employees with personal and/or work-related concerns such as stress, financial issues, legal issues, family problems, office conflicts and alcohol and substance use disorders. EAPs also often work with management and supervisors providing advanced planning for situations, such as organizational changes, legal considerations, emergency planning and response to unique traumatic events.

For additional information about EAPs, you may want to review the following resources:

- ➔ [OPM Information about Employee Assistance Programs](#)
- ➔ [ODEP Employee Assistance Programs for a New Generation \(PDF\)](#)