

► IS ADA THE NEW FMLA?

Insights on Outsourcing Employer
Compliance Support Services



SUMMARY

All employers need to manage family and medical leaves and make reasonable accommodations for employees with disabilities. To ease the resulting administrative overload, many employers are exploring the best way to address the requirements such that they are compliant with federal and state regulations.

The Prudential Insurance Company of America (Prudential) sponsored a survey of employers to better understand the disability and absence services that employers need and how they work with outsourcing partners.¹ The scope of this report includes services to support compliance with the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), and Americans with Disabilities Act Amendments Act (ADAAA).

The results of the survey reveal that:

1. Virtually all employers consider having FMLA and ADA service capabilities in their organizations to be important. However, the gap between employers' importance ratings and adoption rates suggests that there are unmet needs for services.
2. Almost half of employers report outsourcing some or all of their FMLA and ADA services. The prevalence of ADA outsourcing, however, may be overstated based upon a "disconnect" in employers' understanding about service capabilities.
3. About 40% of employers expect the importance of outsourcing FMLA and ADA services to increase. The trends cited as driving the increase include an increasingly complex regulatory environment, a heightened focus on health and wellness, and an aging workforce.
4. About two-thirds of employers that do not outsource ADA services or outsource partially are extremely, very, or somewhat likely to increase their level of outsourcing.
5. Employers cite a variety of obstacles to outsourcing.
6. Prudential concludes that the adoption and outsourcing patterns of ADA services mirror those of FMLA.

Please note: All statistical information was taken from the Greenwald & Associates survey of February 2015.

¹ Greenwald & Associates surveyed 341 employers in February 2015. Respondents had decision-making authority for the selection or administration of group disability and absence management services. Respondents reflect a mix of private and public organizations with at least 500 employees.

OVERVIEW OF FMLA AND ADA REQUIREMENTS FOR EMPLOYERS

All employers need to manage family and medical leaves and make reasonable accommodations for employees with disabilities. To ease the resulting administrative overload, many employers are exploring the best way to address the requirements so they remain compliant with federal and state regulations.

Prudential sponsored a survey of employers to better understand the disability and absence services that employers need and how they work with outsourcing partners. The scope of this research brief includes services to support compliance with the FMLA, ADA, and ADAAA.² This survey may also help employers understand what other organizations are doing to meet FMLA and ADA requirements, and what options are available to them.

Understanding FMLA and ADA

Enacted in 1993 as a leave entitlement law, FMLA provides eligible employees with up to 12 weeks (26 weeks for military caregivers) of unpaid, job-protected leave per year. The requirements set forth are extensive and prescriptive, which prompted employers to build internal infrastructures to help ensure compliance. Outsourcing options emerged to address employer challenges. Today, most employers have administrative procedures in place to meet FMLA requirements.

The ADA was enacted three years earlier than FMLA, but it has received less attention by employers until recently. Passed in 1990 as a civil rights law, the ADA sought to prohibit discrimination based on disability by requiring employers to make “reasonable accommodations” to employees with disabilities. It was not until 2008 and the passage of the ADAAA, which significantly broadened the definition of disability to cover a larger segment of employees, that employers were confronted with the administrative challenge of compliance.

ADA requirements are not as clearly defined as FMLA requirements—ADA requires individual customized assessments of accommodation needs and requires specialized knowledge. Today, most employers have taken some steps to comply with ADA, but are struggling to understand the requirements. Many still need education and guidance.



Prudential sponsored a survey of employers to better understand the disability and absence services that employers need and how they work with outsourcing partners.

² All references to ADA in this research brief pertain to both ADA and ADAAA unless otherwise noted.

FMLA and ADA Capabilities

Most employers have already adopted some or all of the “threshold” capabilities (the minimum capabilities) required to comply with FMLA regulations. For example, employers are required to designate an employee’s absence as FMLA qualified, and provide notice of FMLA rights and responsibilities within five business days of being notified of a request for qualified leave.

Many employers now focus on how effectively and efficiently their programs are administered. To that end, there are additional capabilities that build on the threshold FMLA capabilities and facilitate streamlined administration. The FMLA capabilities listed below relate to the intake, decision, and output/reporting functions.

FMLA: Capabilities that Build on Threshold Capabilities

Intake	<ul style="list-style-type: none">▶ Flexibility to report an absence via telephone, interactive voice response, web portal, or mobile app▶ Ability to upload supporting leave documentation to a web portal
Decision	<ul style="list-style-type: none">▶ Eligibility decisions▶ Leave decisions▶ Ongoing intermittent time request decisions after initial request approved
Output	<ul style="list-style-type: none">▶ Status updates for supervisors via email▶ Status updates for employees via email▶ Self-service web reporting▶ Custom reports

Compliance with ADA regulations, on the other hand, requires capabilities that are less clearly defined, less routine, and more time-consuming than FMLA capabilities. In addition, many employers are still building an understanding of the ADA requirements, and are focused on implementing threshold capabilities. The ADA capabilities listed below are threshold capabilities needed to meet ADA requirements with regard to initial assessment, accommodation, and education.

For the purposes of this report, the list below comprises the scope of capabilities for FMLA and ADA covered by Prudential’s survey.

ADA: Threshold Capabilities

Initial Assessment	<ul style="list-style-type: none">▶ Review medical documentation to confirm ADA disability▶ Facilitate interactive process
Accommodation	<ul style="list-style-type: none">▶ Identify stay at work accommodations▶ Identify return to work accommodations▶ Track leave as an accommodation
Education	<ul style="list-style-type: none">▶ Supervisor training▶ Consultation and compliance support

KEY FINDINGS

1. Virtually all employers consider having FMLA and ADA service capabilities in their organizations to be important. The gap between employers' importance ratings and adoption rates, however, suggests that there are unmet needs for services.

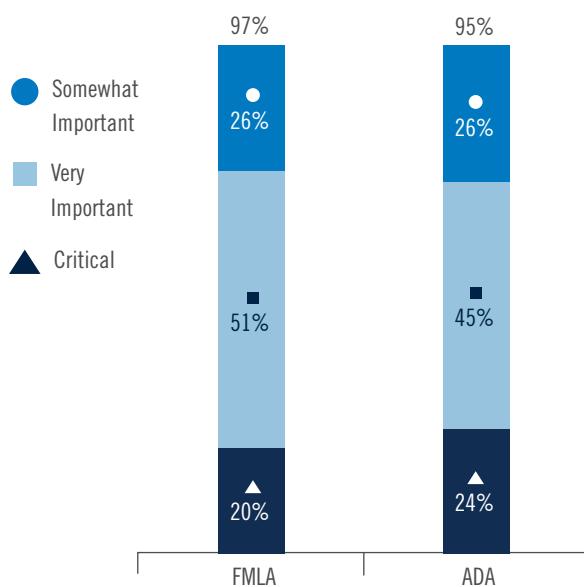
Nearly all employers believe that FMLA and ADA service capabilities are critical, very important, or somewhat important to their organizations.

This is not surprising, given that compliance is a regulatory mandate.

Large employers³ feel even more strongly than smaller employers that FMLA and ADA services are critical to their organizations, most likely because the incidence of FMLA and ADA requests is greater in large organizations, requiring an administrative infrastructure to support the volume. Survey results indicate that 37% and 35% of large employers consider FMLA and ADA capabilities, respectively, to be critical, versus 20% and 24% for employers of all sizes.

The FMLA service capabilities listed below expedite the leave process and improve data availability. For each service capability, 68%–90% of employers consider that capability to be at least somewhat important. Yet, even the most commonly adopted capability—email absence status updates to employees and/or supervisors—is established by only about two-thirds (68%) of employers, even though 90% consider it to be important. The wide gap between employers' importance ratings and adoption rates suggests that there are unmet needs for all of these services.

Employers (%) that Consider FMLA and ADA Capabilities Important



FMLA Service Capabilities

		Percentage of Employers: Important*	Adoption
Intake	► Ability to report absence by interactive voice response, web, or mobile	76%	45%–53%
	► Ability to upload documents (i.e., medical certification) to web portal	89%	57%
Decision	► Automated and immediate employee eligibility decision upon absence submission	84%	42%
	► Automated decisions on intermittent day requests after initial approval obtained	85%	47%
Output	► Email absence status updates to employees and/or supervisors	90%	68%
	► Text message absence status updates to employees	68%	33%
	► Self-service absence reports	83%	50%
	► Custom absence reports	86%	55%

* Employers rating service capability as critical/very/somewhat important.

³ Large employers are defined as 5,000+ lives. Mid-size employers are defined as 1,000–5,000 lives.

Because the ADA service capabilities listed below are baseline capabilities that are the threshold for compliance, adoption rates are higher relative to FMLA service capabilities mentioned earlier. Almost all employers (95%+) consider each ADA service capability to be at least somewhat important. However, the gap between employers' importance ratings and adoption rates is wide. Even the most commonly adopted ADA capability is established by only 81% of employers, which may indicate a lack of understanding of compliance requirements.

Surprisingly, only 71% of employers have supervisor training in place, dropping to 62% for larger employers. Front-line leaders are critical to an employer's ongoing compliance with the ADA, because they are the first line of defense when employees make accommodation requests. These results suggest that employers should consider implementing a structured supervisor training program to ensure that their front-line leaders know how to react appropriately and consistently to accommodation requests.

ADA Service Capabilities

		Percentage of Employers:	
		Important*	Adoption
Initial Assessment	► Review medical documentation to confirm ADA disability ► Facilitate interactive process between supervisor/HR and employee	95% 95%	79% 79%
Accommodation	► Identification of accommodations to help employees stay at work ► Identification of accommodations to help employees return to work after a disability absence ► Tracking ADA leave as an ADA accommodation	96% 95% 96%	77% 80% 77%
Education	► Supervisor training ► Consultation and compliance support	96% 96%	71% 70%

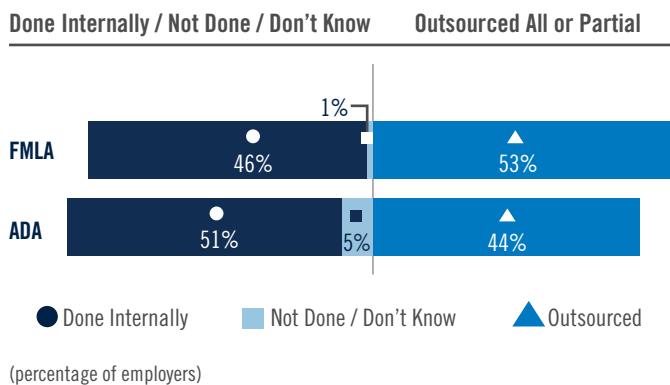
* Employers rating service capability as critical/very/somewhat important.



Even the most commonly adopted capability is established by only 81% of employers, which may indicate a lack of understanding of compliance requirements.

2. Almost half of employers report outsourcing some or all of their FMLA and ADA services. The prevalence of ADA outsourcing, however, may be overstated based upon a “disconnect” in employers’ understanding about service capabilities.

More than half of employers (53%) report that they outsource FMLA services. Less than half (44%) indicate that they outsource ADA services. Five percent either do not provide ADA services at all or are not aware whether they provide it—which is significant for capabilities that are required by regulations.



Outsourcing partners are key

FMLA outsourcing partners include insurance carriers, third party administrators (TPAs), and payroll vendors. Insurance carriers have the largest share of outsourcing across employers of all sizes. As the graph on the next page shows, large employers (62%) outsource FMLA more than small employers. Even though larger employers usually have a Human Resources Department to recognize and manage this compliance challenge, they may leverage their internal expertise to outsource the administrative burden to an external partner.

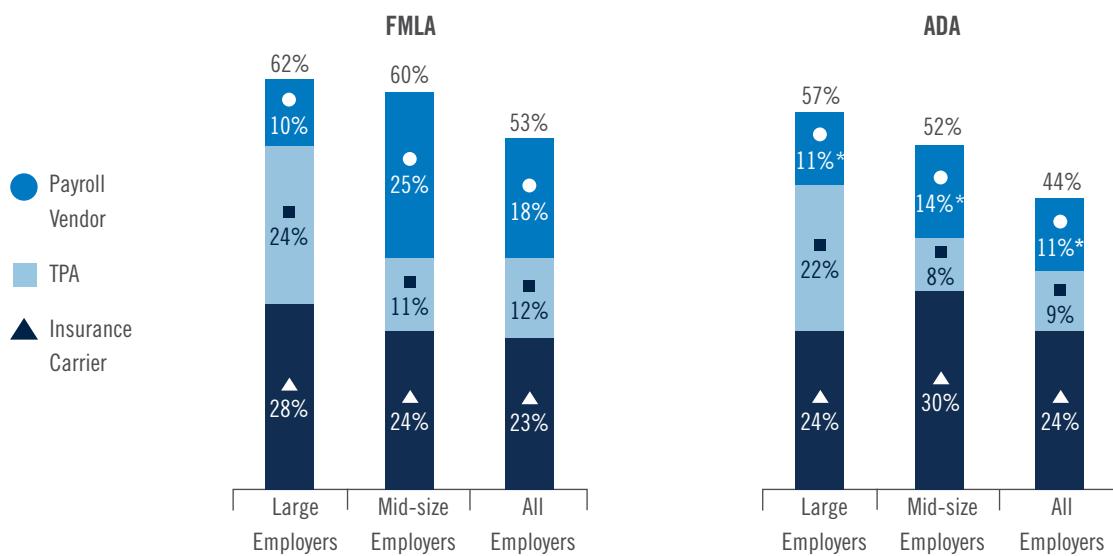
Similar to outsourcing for FMLA, insurance carriers have the largest share of outsourcing across employers of all sizes for ADA capabilities. At 57%, large employers tend to outsource ADA more than small employers.

The employer “disconnect”

The percentage of employers who indicate they outsource ADA services to payroll vendors is surprising, given that payroll vendors do not provide many ADA services. This may indicate a disconnect in understanding the services provided vis-à-vis the requirements, even for larger employers. Specifically, a large number of employers indicate payroll vendors provide ADA services, even though payroll vendors do not routinely provide them.

- ▶ Twice as many employers report that tracking ADA leave as an accommodation is handled by their payroll vendor (33%) versus handled internally (16%). This may be because payroll vendors track general absences.
- ▶ Survey results indicate that 33% of employers reported having their payroll vendor provide consultation and compliance support, versus 20% handled internally.

Percentage of Employers that Outsource by Outsourcing Partner
(percentage of employers)



* Potential disconnect:
Which ADA services
are provided by
payroll vendors?



The percentage of employers who indicate they outsource ADA services to payroll vendors is surprising, given that payroll vendors do not provide many ADA services.

Selection criteria for outsourcing partners

When asked about the criteria used to select outsourcing partners,⁴ employers rank accuracy in decisions on disability and absence as the most critical factor. Overall quality of customer service ranks second, and timeliness of decisions on disability and absence claims ranks third. Lowest price is ranked as one of the least important factors. Large employers consider most of these items more important than small- and mid-sized employers do.

Importance of Criteria for Selecting Outsourcing Partners⁴

(percentage of employers)



Outsourcing Satisfaction

On average, employers who outsource are more satisfied with their FMLA and ADA services than employers that handle them internally. Nearly two-thirds (62% and 63%, respectively) of employers that outsource FMLA and ADA respectively are extremely or very satisfied with their service capabilities, versus about half of employers (46% and 50%, respectively) that handle these services internally.

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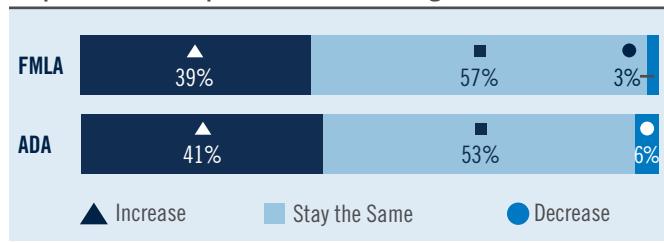


⁴ The survey question covered selection criteria for disability and absence management service capabilities.

3. About 40% of employers expect the importance of outsourcing FMLA and ADA services to increase. The trends cited as driving the increase include an increasingly complex regulatory environment, a heightened focus on health and wellness, and an aging workforce.

The trend for outsourcing seems to be growing. About 40% of employers expect the importance of outsourcing to increase in the next three years—only a handful think it will decrease. Large employers expect the importance to increase more than small- and mid-sized employers.

Expectations on Importance of Outsourcing



(percentage of employers)

Employers that currently outsource expect outsourcing to increase in importance more than employers that do not outsource. Nearly two-thirds of employers that expect the importance to increase are already outsourcing.

Employers cite several trends as impacting the outlook on outsourcing:

- ▶ A total of 58% of employers cited cost pressure to reduce benefit spending as a major factor impacting outsourcing. This may be interpreted in two ways—a reluctance to incur the direct costs of outsourcing, or as a way to reduce the direct costs of handling internally.
- ▶ About half (51%) of employers expect outsourcing will become more important in terms of dealing with increasingly complex regulations. The myriad of applicable laws—municipal, city, state, federal, employment, leave, and anti-discrimination—interact or contradict one another. Moreover, the cost of non-compliance is high.
- ▶ An aging workforce is also considered to drive the importance of outsourcing. By 2020, one out of every four workers will be 55 years or older, up from 12% in 1990.⁵ Disability prevalence increases with age—workers under 40 years old are 5% likely to become disabled versus 10% for those 60+.⁶

Employers Factors Impacting Outsourcing Outlook

Employers	Factors Impacting Outsourcing Outlook
58%	Cost pressure from employer to reduce benefit spending
51%	Increasingly complex regulatory environment
41%	An aging workforce
37%	Increasing sophistication of vendor capabilities
36%	Fewer internal resources to administer benefits

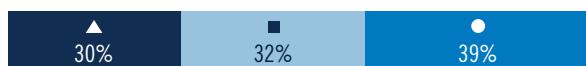
⁵ Toossi, Mitra, "Labor force projections to 2020: A more slowly growing workforce," *Monthly Labor Review*, January 2012, page 44.

⁶ Disability Management Employer Coalition and Cornell University, "State of the Field: Absence and Disability Management Practices for an Aging Workforce," 2013, pages 3–4.

4. About two-thirds of employers that do not outsource ADA services or outsource partially are extremely, very, or somewhat likely to increase their level of outsourcing.

Employers' outlooks differ for outsourcing ADA and FMLA. Virtually all of the employers that outsource most FMLA capabilities⁷ are extremely, very, or somewhat likely to continue to outsource. Large employers that outsource most capabilities cite even stronger intentions; 82% report that they are extremely or very likely to continue outsourcing, versus 28% for mid-size employers. The propensity to continue outsourcing amongst larger employers may be because their programs have been outsourced longer and are achieving tangible results.

Likelihood to Increase Outsourcing ADA
(Employers that Do Not Outsource or Outsource Partially)



▲ Extremely/Very Likely ■ Somewhat Likely

In contrast, employers appear hesitant to outsource ADA services to a partner—only 62% of those who do not outsource most ADA capabilities⁸ report that they are extremely, very, or somewhat likely to increase their level of outsourcing. However, a significant majority (84%) of employers that outsource most ADA capabilities say that they are extremely or very likely to continue to outsource. This suggests that, as more employers try outsourcing, they will continue to do so.

Likelihood to Continue Outsourcing ADA
(Employers that Outsource Most Capabilities)



▲ Extremely/Very Likely ■ Somewhat Likely

^{7, 8} "Most capabilities" refers to the capabilities included in the survey, which are listed on page 4.

5. Employers cite a variety of obstacles to outsourcing.

For FMLA services, 59% of employers cite cost as an obstacle to outsource. Price, however, is ranked as one of the *least* important factors in the selection of outsourcing partners. Employers may want to weigh the costs of outsourcing against the potential benefits. Integrating FMLA and other benefit programs with a partner may reduce costs of absence by lowering durations and improving return-to-work results. Outsourcing vendors reported saving employers up to 15%.⁹

About one-third of employers cite concerns about implementation complexity, other priorities, and lack of senior management commitment for FMLA capabilities. This suggests that employers may assume that the time and dedicated resources from their staffs to set up an FMLA outsourcing program could be onerous. Finding a partner to lead the implementation may be the key to success in outsourcing FMLA services.

Similar to FMLA, over half of employers (60%) cite cost as an obstacle to outsourcing ADA capabilities. The cost of non-compliance, however, can be much higher than the cost of outsourcing. In 2014, \$96 million was awarded for ADA charges¹⁰—excluding awards resulting from litigation.

Half (50%) of employers cite that their current internal administration is effective in providing ADA capabilities. Employers may lack knowledge about ADA requirements, which may lead them to think that their procedures are sufficient. In addition, they may want to consider the capacity constraints of their in-house administration—30% of employers in a Mercer survey reported an increase in ADA accommodation requests.¹¹ As employers and employees better understand ADA protections, this trend may continue and further strain internal resources.

Lack of awareness of ADA outsourcing availability is also cited as an obstacle. A reported 18% cited that they were not aware that ADA services could be outsourced as a major reason for not outsourcing, while another 29% said it was a minor reason.

Generally, large employers cite fewer obstacles than do small- and mid-sized employers.

Obstacles to Outsourcing FMLA and ADA (percentage of employers citing as major obstacle)

FMLA	%	ADA	%
Cost	59%	Cost	60%
Implementation complexity/resource requirements	32%	Current in-house administration is effective	50%
Other priorities/lack of senior management commitment	31%	Legal/compliance concern with outsourcing	30%
Legal/compliance concern with outsourcing	30%	Vendors do not present a compelling case	30%
Vendors do not present a compelling case	27%	Other priorities/lack of senior management commitment	29%
Technology issues (e.g., eligibility feeds)	23%	Technology issues	24%
Current leave policy too complex to outsource	15%	Not aware that ADA services could be outsourced	18%

⁹ Spring Consulting Group, “2012/2013 Design, Delivery and Outcomes in the Integrated Disability, Absence and Health Management Marketplace,” June 2013, page 66.

¹⁰ U.S. Equal Employment Opportunity Commission, ADA Enforcement and Litigation Statistics, 2014 (www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm).

¹¹ Mercer, “Survey on Absence and Disability Management: 2013 Survey Report,” page 19.

6. Prudential concludes that the adoption and outsourcing patterns of ADA services mirror those of FMLA.

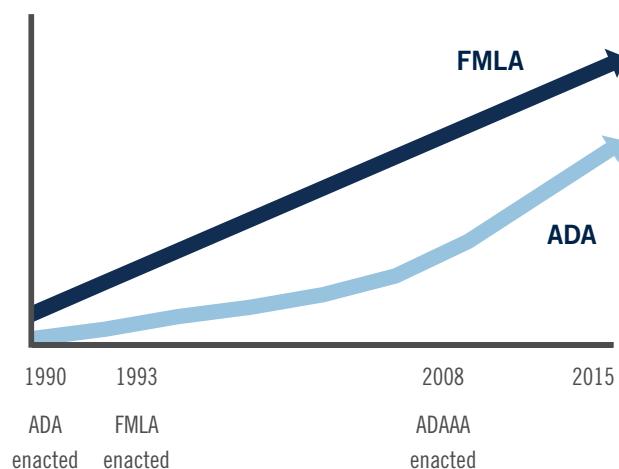
Generally, the path to readiness to meet regulatory compliance starts with employers adding the most basic required capabilities, and then assessing the full range of capabilities needed to meet all requirements. In anticipation of the increased workload that employers will face, outsourcing providers may build the capabilities so employers can offload some or all of the administration burden. Employers explore whether outsourcing some or all services makes sense for their organization.

Even though both FMLA and ADA were enacted in the early 1990s, the compliance readiness gap is wider for ADA than for FMLA. The requirements for FMLA were clear and tangible from the start, which may have compelled employers to immediately implement administrative practices. ADA's requirements, on the other hand, were less clearly defined, until the ADAAA broadened the definition of disability and increased the focus on accommodations in 2008. After a slow start, employers are now taking a more active approach to meeting ADA compliance readiness, as illustrated by the "hockey stick" pattern depicted below.

Employers' ADA service capabilities adoption pattern mirrors and lags behind FMLA. Today, 5% of employers do not have, or do not know if they have, any ADA services, versus 1% for FMLA. For each ADA service polled, 19%–30% of employers do not have, or do not know if they have, the service. A total of 44% of employers outsource some or all services, versus 53% for FMLA. Furthermore, some employers do not realize that outsourcing is available for ADA services.

FMLA outsourcing more than doubled from 2007 to 2014.¹² Historical data on ADA outsourcing is not available. Outsourcing is expected to increase as employers become more aware of regulations, and as claims potentially increase due to the ADAAA broader disability definition. Moreover, compliance is more challenging for ADA than FMLA, because the ADA requires individual customized assessments of accommodation needs, which require specialized knowledge.

Building Compliance Readiness



¹² Spring Consulting Group, "Fifth Consecutive Employer Survey of Integrated Disability, Absence, and Health Management 2013/2014," June 2014, page 61.

EMPLOYER TAKEAWAYS

- ▶ The adoption of FMLA service capabilities has matured beyond whether or not employers have the capabilities to comply. The focus is now on how efficiently their programs are administered.
- ▶ Education is needed to overcome a lack of knowledge about ADA requirements, which could leave some employers at risk of being non-compliant. Today, many employers do not have, or do not know if they have, the capabilities that are needed for ADA compliance.
- ▶ Outsourcing is expected to continue to play an important role in alleviating employers' administrative burden due to:
 - Fewer internal resources to handle requirements
 - Lack of specialized knowledge needed to fulfill the requirements effectively
 - High cost of non-compliance
 - Increased availability of outsourcing opportunities
- ▶ The pattern of ADA adoption is expected to mirror the pattern of FMLA adoption.

KEY TERMS

ADA Services: The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to qualified employees with a disability as defined by the regulations. Employers may outsource some administrative processes that support their compliance with these requirements.

FMLA Services: A program to monitor, track, and control employee unplanned absences. Most often includes administration of Federal Family and Medical Leave (FMLA) and similar state leaves. Services may include administration of municipal/city leaves, jury duty, military leave, and company-specific leaves.

Return to Work: Interventions designed to help employees get back to work after a disability absence. Examples include work hardening programs, transitional work assignments and flexible hours.

Stay at Work: Interventions designed to help employees avoid being absent from work due to a health condition. Examples include part-time work, modified duty, or a workspace modification.

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