
Fair Pay and Safe Workplace Executive Order, Increased FMLA Enforcement Efforts

By Kurt M. Graham / Jul 22, 2014

In an unexpected announcement, the U.S. Department of Labor (DOL) Family Medical Leave Act (FMLA) Branch Chief Helen Applewhite says the DOL will be increasing its enforcement of the FMLA by having more on-site visits by its investigators.

What does this mean for employers? If a DOL investigator performs a compliance audit, expect a thorough review of required documents, document requests, and DOL interviews of your supervisors and employees.

What records must an employer have?

The FMLA requires that employers maintain the following records for a three year period:

- **Basic payroll information** and identifying employee data, including compensation paid to the employee and the manner in which it was determined, as well as all additions and reductions in pay. (Even employers with no FMLA-covered employees must keep these records.)
- **A record of dates when FMLA leave was taken** by FMLA-eligible employees (time records, requests for leave, etc., if so designated).
- **The hours of FMLA leave taken** by eligible employees if in increments of less than one full day.
- **Copies of all notices** given by the employer to employees, as well as any received by the employer requesting FMLA leave.
- **Records of any disputes** between the employer and an eligible employee regarding the designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.
- **Denials** . Records clearly showing that exempt employees worked fewer than 1,250 hours in a 12-month period, if leave is denied.
- **FMLA-related medical records** and documents pertaining to medical certifications, recertifications, or medical histories of employees or employees' family members created for the purposes of complying with the FMLA.

What happens during an on-site investigation?

The DOL typically provides advance notice of an inspection. However, the DOL has the authority to undertake unannounced employer visits. As a result, an employer should have a procedure in place for handling such situations, including having a designated person who is prepared to respond to an investigation at a moment's notice.

The on-site investigation generally proceeds in the following manner:

Investigative conference . The investigator may request a conference, during which he or she will explain how the investigation will proceed. It is very important at this stage to determine the scope of the investigation, including the laws that might be implicated and what locations and/or categories of employees will be involved.

Records review . As discussed above, the investigator may review the employer's FMLA records, payroll records, and other relevant documents. If the investigation is the result of an employee complaint, the investigator will also need to examine records that will allow him or her to determine whether the employee meets FMLA's eligibility requirements.

Employee interviews . The investigator will also want to interview employees regarding the employer's FMLA practices. Interviews are normally conducted on the employer's premises.

Final conference . When the investigation is complete, the investigator will inform the employer whether he or she has uncovered any violations and, if so, advise the employer how to correct them, including possible financial remedies.

It is critical that an employer not only adequately prepare in advance for a DOL investigation but also appropriately respond during the course of the on-site visit. In the event you are advised of a requested DOL investigation, we can assist with advising on whether to:

- Present additional factors or evidence to the DOL;
- Concur with the investigator's findings and comply with his or her instructions;
- Enter negotiations to reduce the amount owed; or
- Contest the finding.

If you have any questions about how this development may apply to your workplace, please contact [Kurt Graham](#) at (616) 608-1144, or your Clark Hill labor and employment attorney.