

FMLA Compliance – What Every Employer Needs to Know

Delaware Valley Labor and Employment Law Conference

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FAMILY AND MEDICAL LEAVE ACT

“Of all the laws enforced by the Department of Labor, the FMLA is the easiest for employers to administer.” – Former U.S. Secretary of Labor Alexis Herman

FMLA REALITIES

- The FMLA was created to help employees, but some take advantage of it
- The FMLA is a strict-liability law – honest mistakes still result in liability
- Even worse? The regulations don't take into account the real-world

WHAT WE WILL COVER TODAY

- Review “FMLA basics”
- Analyze “complex” FMLA issues
- Look at real-life scenarios

FMLA – THE BASICS

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FMLA – COVERED EMPLOYER

- A covered “employer”
 - A covered employer under the FMLA is one with 50 or more employees, who have worked at least 20 or more workweeks in the current or prior calendar year
 - If an employer has multiple locations, there must be at least 50 employees within a 75-mile radius for that location to be covered
 - Public (government) agencies and schools are subject to the FMLA regardless of the number of employees

FMLA – QUALIFIED EMPLOYEE

- A qualified “employee”
 - A qualified employee has been employed by the employer for at least one year
 - The employee must have worked at least 1,250 hours for the employer in the preceding 12 months
 - The employee must have a qualifying condition, such as their own “serious health condition”

FMLA – RIGHTS AND BENEFITS

- If both employer and employee qualify under the FMLA
 - The employee has the right to up to 12 workweeks of unpaid leave in a 12-month period, which can be taken in one or more blocks of time or intermittently over the course of a prolonged period
 - The employee is entitled to job reinstatement upon return from leave, in the same or equivalent role
 - The employee retains group health benefits during the leave period

FMLA – ADDITIONAL EMPLOYER OBLIGATIONS

- Covered employers are also required to take other affirmative steps, such as
 - As soon as the employer reasonably knows that an employee is entitled to FMLA leave, the employer should communicate with the employee
 - Provide the employee with an official eligibility notice and keep track of how much of the total leave allotment will be deducted from the employee's leave bank

FMLA BASICS – SERIOUS HEALTH CONDITION

- A “serious health condition” is an illness, injury, or condition that requires
 - Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay)
 - A period of incapacity requiring absence of more than three calendar days that also involves continuing treatment (or supervision) by a health care provider
 - Any period of incapacity due to pregnancy, including for prenatal care
 - Any period of incapacity (or treatment) due to a chronic health condition (i.e., asthma, diabetes, epilepsy, etc.)

FMLA BASICS – QUALIFYING REASONS

- An eligible employee is entitled to FMLA leave for any of the following
 - The birth of a child and to care for newborn
 - The placement of a child for adoption or foster care
 - To care for the employee's spouse, child or parent who has a serious health condition
 - Because of an employee's own serious health condition
 - Because of a qualifying exigency
 - To care for a covered service member

FMLA BASICS – WHAT IS NOT A SERIOUS HEALTH CONDITION?

- Common cold
- Ear aches
- Routine dental problems
- Upset stomach
- Headaches, other than migraines

FMLA BASICS – PREGNANCY, BIRTH, ADOPTION

- Generally, applies to both mother and father
- Includes bonding time
- May begin before birth if medically necessary
- May also be taken for mother's pregnancy-related disability

FMLA BASICS – CARE FOR OTHERS

- Spouse
 - Husband or wife as recognized under state law based upon the place of “celebration”
- Parent
 - Biological, adoptive, step or foster or any individual who stood in loco parentis

FMLA BASICS – CARE FOR OTHERS

- Son or Daughter
 - Biological, adoptive, step, or foster
 - Legal ward
 - Child of person standing in loco parentis
 - Must be under the age of 18
- OR
 - Is 18 or older and incapable of self-care at the time leave is sought because of a serious physical or mental condition

FMLA BASICS – CARE FOR OTHERS

- Do not need to be only person available to provide care
- “Care” includes psychological care and comfort
- Care requires that employee be physically with the ill family member – not to perform ill person’s other duties
- Leave ends if family member recovers or dies

FMLA BASICS – EMPLOYEE NOTICE

- Foreseeable Leave
 - 30-days notice, except where impracticable
 - Must include timing and duration
 - If requested, employee must explain why could not give 30-days notice
 - Employee must consult with you before scheduling leave and must schedule at your convenience, subject to review by health care provider
- Unforeseeable Leave
 - Must provide notice as soon as practicable, usually same or next business day
 - Must comply with regular call-in procedures

FMLA BASICS – EMPLOYER NOTICE OBLIGATIONS

- Eligibility Notice
 - Must be provided with five business days
 - Must state
 - Whether the employee is eligible for FMLA
 - If employee is not eligible, at least one reason why the employee is not eligible
- Rights and Responsibilities Notice
 - Must be included with the Eligibility Notice
 - Must detail specific expectations and obligations
 - Must explain any consequences for failing to meet expectations and obligations

FMLA BASICS – EMPLOYER NOTICE OBLIGATIONS

- Designation Notice
 - Must be sent within five business days after receiving enough information to determine leave is FMLA-qualifying (i.e. – CHP)
 - Must state any fitness-for-duty certification requirements

FMLA BASICS – CERTIFICATION OF HEALTH CARE PROVIDER

- Must return within 15 calendar days after employee written notice of need to return form
- Must be complete and sufficient
- You must inform employee in writing of consequences for returning late or failing to turn in
- *If employee submits a complete and sufficient certification signed by physician, you cannot request additional medical information*

FMLA BASICS – CERTIFICATION OF HEALTH CARE PROVIDER

- An employer can reject the certification submitted by the health care provider if the information is incomplete or insufficient. In such instances, the employer must
 - Advise employee and state, in writing, what additional information is necessary
 - Employee must be given seven calendar days to cure deficiency
- An employer may also contact the employee's physician for purposes of "authentication" and "clarification"

FMLA BASICS – RETURN TO WORK

- Return must be to same or equivalent position (same pay, benefits, etc.)
- No right to transfer to a different position if cannot perform essential functions of original job
- No right to job restoration where termination/lay-off would have occurred
- Watch out for ADA issues

FMLA BASICS – RETURN TO WORK

- Employee entitled to any unconditional pay increases during FMLA period
- Pay increases conditioned on seniority, length or service or work performed must be granted in accordance with your policy for non-FMLA leaves
- Employee can be denied bonuses that require the achievement of a specific goal, so long as employees on non-FMLA leaves are treated the same

COMPLEX FMLA ISSUES – INTERMITTENT LEAVE, RECERTIFICATION, FRAUD

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COMPLEX ISSUES – INTERMITTENT LEAVE

- An employee can take intermittent FMLA in instances where there is a medical need for leave that can best be accommodated through intermittent leave or reduced schedule
 - Intermittent leave can be broken down into weeks, days, hours
 - The employer must permit smallest increment of time otherwise allowed for other forms of leave
 - The employer can require the employee to comply with the established call-in policy
 - The employer can also require that the HCP to certify the “medical necessity”
 - For planned treatments, the employer can ask the employee in advance for his/her schedule and cooperation

COMPLEX ISSUES – RECERTIFICATION

- When the certification expires by its terms, employee must provide updated CHP
- The employer may request recertification every six months in connection with an absence by the employee
- Exceptions:
 - The employer may request recertification no more often than time stated on form or 30 days, unless
 - Circumstances have changed significantly
 - You receive information casting doubt on the reason for absence

COMPLEX ISSUES – RECERTIFICATION

- Change in circumstances
 - Items in CHP changed significantly
 - Duration/frequency
 - Nature or severity of illness
 - Pattern of FMLA leave used suspiciously or in conjunction with other days off
 - Other suspicious circumstances
 - You may provide health care provider absence pattern and ask if need for leave consistent with pattern of absences

COMPLEX ISSUES – RECERTIFICATION

- Casts doubt
 - Example: CHP states four weeks of leave needed for knee surgery and recuperation, employee is seen playing softball in company league on week three

COMPLEX ISSUES – FRAUD

- Investigation required
- Obtain “particularized facts”
- Make “reasonably informed and considered decision”
- Confront employee
- Act in good faith

COMPLEX ISSUES – FRAUD

- Common fraud scenarios
 - Annual timing
 - Every summer; same week every year; adjacent to holidays, etc.
 - Unreal circumstances
 - Employee out of PTO, but wants to take vacation
 - Consistent exhaustion of leave time
 - Employee has exactly 12 weeks of health problems every year

REAL-WORLD SCENARIOS

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SCENARIO – “I’M SICK”

Jane calls in for the fifth consecutive day and leaves a voicemail for her manager: “I won’t be in again today, I’ve been throwing up and I’m really sick.” Jane had no known medical conditions and has never applied for FMLA leave.

SCENARIO – “I’M SICK”

Have your obligations under the FMLA been triggered?

- A. Yes, Calling in three or more consecutive days is enough to trigger the FMLA
- B. Yes, Jane has said enough to put you on notice that she may be suffering from a serious health condition
- C. No, she has not provided enough information to trigger the FMLA

SCENARIO – “I’M SICK” PART II

Matt calls in and tells his manager “I won’t be in today, I’m not feeling well.” Matt has been approved for intermittent FMLA leave due to migraine headaches.

SCENARIO – “I’M SICK” PART II

Have your obligations under the FMLA been triggered?

- A. Yes, Matt has been approved for intermittent leave and his absence is covered
- B. No, Matt has not complied with his obligations or given sufficient notice under the FMLA

SCENARIO – PROBLEM EMPLOYEE

Kelly is the HR manager at your new facility. She just underwent shoulder surgery and is out for four weeks. While she is out, Jack, an HR manager from another facility is temporarily filling in for Kelly. Jack discovered a variety of problems, including unanswered e-mails, employee complaints that had not been investigated, sloppy recordkeeping, and other inefficient processes. Jack also receives multiple complaints from Kelly's subordinates describing her as a bully, an unorganized manager and a "problem in the office." Jack tells the VP of HR about these issues. The VP of HR investigates and wants to terminate Kelly the day she returns.

SCENARIO – PROBLEM EMPLOYEE

You should

- A. Agree, he's the VP and responsible for your raise
- B. Agree, because any other employee would be terminated for these things
- C. Put her on a final written warning

SCENARIO – POSSIBLE FRAUD

John suffers from severe hip pain. He certified for intermittent FMLA following his hip replacements. On Tuesday, John called out of work citing hip pain. He called out again on Wednesday for the same reason. On Wednesday night, John drove to a local bar and had several drinks. On his way home, he was stopped by the police and taken to a local hospital for a blood test. He spent the night in jail and was released on Thursday morning. He was scheduled to work on Thursday but called out again and indicated that he would be using FMLA again for hip pain. He returned to work the following week and did not report the incident to anyone at work. Months later, John pled guilty to the charge of driving under the influence. HR eventually found out about the DUI and conducted an investigation.

SCENARIO – POSSIBLE FRAUD

HR should

- A. Refuse any further requests from John to take FMLA
- B. Fire John for failing to report the DUI
- C. Interview John, request documentation from his physician, and make a good faith determination as to whether he was abusing his intermittent leave

SCENARIO – RUNNING OUT OF LEAVE

You granted Tom intermittent FMLA leave on September 1, 2016 for epilepsy. Since that time, Tom has been absent from work for a total of 380 hours. If Tom exceeds 480 hours (12 weeks) of leave before September 1, 2017, can you terminate him?

SCENARIO – RUNNING OUT OF LEAVE

- A. It depends. You should send a letter asking Tom to call you to discuss his leave situation.
- B. No, Tom needs intermittent leave as an ADA accommodation for his epilepsy regardless of the FMLA
- C. Yes, once Tom exceeds 480 hours of leave, his job is no longer protected and you may terminate him for any additional absences

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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