

# FMLA

## *Master Class*



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# Agenda for Today



**I. FMLA Compliance Essentials**



**II. Certifying & Controlling Intermittent Leave**



**III. Managing Accommodations, Preventing Abuse**



**IV. Return to Work**

# **FMLA** *Master Class*

## **FMLA Compliance Essentials**



# FMLA Compliance Essentials

## The Family and Medical Leave Act basic concepts

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

- Signed into law in January 1993 – first legislation signed by President Clinton upon taking office.
- First draft legislation was introduced back in 1984 and every year from then on.
- Congress passed in 1991 and 1992 but it was vetoed both times (and not overridden by Congress) by President George H. W. Bush.



# FMLA Compliance Essentials

## Time Off Before the FMLA

Historically, the United States has not mandated any paid time off on a national level.

- There was no paid or unpaid leave guaranteed under the Fair Labor Standards Act (FLSA).
- Employers sometimes provided time off voluntarily.
- Employees who took time off from work could be fired with no recourse – it didn't matter how urgent the need to miss time was.



# FMLA Compliance Essentials

## Time Off Before the FMLA

The FLSA instead set limits on how many hours hourly employees can be made to work without being paid overtime.

- Other FLSA provisions simply mandated a minimum wage and that hourly workers must be paid for all time that they do work.
- “White collar” exempt workers did have more flexibility – in that the FLSA mandates that exempt workers who work any part of the workweek must be paid for the entire workweek. A sick exempt worker would thus be paid for missing work – within limits.



# FMLA Compliance Essentials

## Time Off Before the FMLA

**Bottom line:** There was no national right to take time off for illness, starting a family or caring for a sick family member with or without pay – until Congress passed and President Clinton signed the FMLA. The passage of the FMLA was hailed as a major victory for workers much as the FLSA was decades earlier. And it was widely expected that unpaid FMLA leave would slowly give way to paid FMLA leave.



# FMLA Compliance Essentials

## United States is the Outlier on Paid and Unpaid Leave

Almost every other nation provides some form of paid leave – especially for parental needs. Only the U.S. and Papua New Guinea provide none. Some examples:

**Croatia:** 30 weeks of fully-paid maternity leave

**Finland:** 7 months for each parent – or 14 months for single parent

**Greece:** 43 weeks off at 54.2% of pay

**Iceland:** 12 months total split between parents

**Norway:** Mothers can take 49 weeks at full pay or 59 weeks at 80% pay



# FMLA Compliance Essentials

## Only some employers are required to provide FMLA leave

### Covered employers:

- Private-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer
- Public agency, including a local, state, or Federal government agency, regardless of the number of employees it employs
- Public or private elementary or secondary school, regardless of the number of employees it employs



# FMLA Compliance Essentials

## Only some employers are required to provide FMLA leave

### Covered employers:

- Employers with multiple locations are only covered if there are 50 employees within 75 miles of the location.
- To determine the 50-employee count, employers must count every employee on the payroll – full or part-time. No minimum hours worked are required for counting the number of employees. That's only relevant for determining if a particular employee is eligible for FMLA leave – not whether the employer is required to provide leave.
- Employers should carefully consider when to add employees if they are near coverage based on employee count. Remember, adding just one part-time employee could tip you over into coverage.



# FMLA Compliance Essentials

## Only some employers are required to provide FMLA leave

### Covered employers:

- The 20-workweek requirement is meant to cover seasonal businesses
- The 20 workweeks do not have to be consecutive – it can be any 20 workweeks
- Once the 50 employees for 20 workweek requirement is met it continues for that year plus the next year. That is, once covered, an employer remains covered until a full year has passed with fewer employees.
- That provision is meant to allow employees who earned FMLA leave during the eligibility year to retain the right to leave even if the employee count drops. The drafters may have wanted to avoid employers dropping employees below the 50 count to deny leave.



# FMLA Compliance Essentials

## Pregnant Workers Fairness Act (PWFA)

The PWFA was passed in late 2022 and went into effect in 2023

- **Reasonable pregnancy accommodations:** The PWFA applies to employers with far fewer workers than the FMLA – 15 versus 50. It requires reasonable accommodations for pregnancy related conditions and is enforced by the EEOC – not the DOL
- **PWFA includes leave:** The EEOC's final regulations – leave as a reasonable accommodation for pregnancy related conditions including infertility treatment, miscarriage, abortion, birth and recovery and post-partum complications like depression. **EEOC recently announced they are revisiting some of these regs, focusing on pregnancy and immediate recovery period.**



# FMLA Compliance Essentials

## Only some employees are entitled to FMLA Leave

**Covered employees:** To be entitled to leave, employees must:

- Have worked for the employer for at least 12 months.
- Breaks in service are allowed if they are for less than seven years, or the break was covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA).
- Have worked at least 1,250 hours for the employer within the last 12 months before leave starts.



# FMLA Compliance Essentials

## Only some employees are entitled to FMLA Leave

### Covered employees: Other conditions:

- Some part-time workers are covered if their hours total 1250 for the year
- For an employee who works 52 weeks in a year, that amounts to about 24 hours per week on average for the year
- The employee must also work at a location where the employer has at least 50 employees within 75 miles



# FMLA Compliance Essentials

## Only some employees are entitled to FMLA Leave

### Covered employees: Teleworkers

- Guidance from the DOL clarifies when teleworkers are covered based on being one of 50 or more workers within 75 miles
- The employee's residence is not a worksite
- Their worksite is the office to which they report or receive assignments from
- It does not matter if none of the teleworkers work inside the 75-mile radius – if they are one of 50 or more receiving work from the same office or sending work to it.



# FMLA Compliance Essentials

## FMLA leave of up to 12 unpaid weeks is available for the following reasons:

- **Self-care.** Employees who suffer from a serious health condition may take up to 12 weeks of unpaid FMLA leave. This is the so-called self-care provision.
- **Birth or adoption.** Employees can take FMLA leave following the birth, adoption, or foster care placement of a child.
- **Care for a spouse or immediate family member.** Employees may take FMLA leave to care for a spouse, parent, child, or other immediate family member suffering from a serious health condition. Special rules apply to family members in the military.



# FMLA Compliance Essentials

**FMLA leave of up to 12 unpaid weeks is available for the following reasons:**

**Military deployment.** Employees may take up to 12 weeks FMLA leave for qualifying exigencies when the employee's spouse, son, daughter, or parent is on covered active duty or call to covered active-duty status as a member of the National Guard, Reserves, or Regular Armed Forces. This includes providing childcare, attending military ceremonies, visiting with the servicemember during Rest and Recreation breaks, and taking care of legal matters related to the absence.

- With current frequent and extended national guard deployments, this is an area employers should pay attention to.



# FMLA Compliance Essentials

**FMLA leave of up to 26 unpaid weeks is available for the following reasons:**

**Military caregiver leave.**

- Employees can take up to 26 weeks of care-giver leave to care for a seriously injured or ill covered servicemember.



# FMLA Compliance Essentials

**Eligibility for FMLA leave renews once per year. Employers can calculate the 12-week entitlement by choosing one of four methods**

**The calendar-year method** is the simplest. Eligible employees are entitled to 12 unpaid weeks during any calendar year. Eligibility resets Jan. 1. However, it also potentially allows an employee to take 24 weeks of continuous unpaid leave if the timing is right.

**The fixed 12-month year method** is based on any fixed 12-month “leave year” the employer chooses, such as the employer’s fiscal year or the employee’s anniversary date.





# FMLA Compliance Essentials

**Eligibility for FMLA leave renews once per year. Employers can calculate the 12-week entitlement by choosing one of four methods.**

**The single 12-month period method** begins on the first day the employee takes leave and ends 12 months later.

**The rolling 12-month calendar method** measures backward from the date an employee first takes FMLA leave.



# FMLA Compliance Essentials

## **Military leave for serious illness or injury**

**The calendar method for military leave to care for a seriously injured or ill servicemember is different.** Counting the year for this type of leave begins on the day the employee first takes leave – regardless of whatever method the employer used for other FMLA leave.

- It is crucial that employers track this type of FMLA leave separately and then integrate the time off into the regular FMLA leave period.



# FMLA Compliance Essentials

## Self Care FMLA Leave

**Self care.** Employees who suffer from a serious health condition may take up to 12 weeks of unpaid FMLA leave. This is the so-called self-care provision.

- One of the most frequently taken forms of FMLA leave
- Requires a serious health condition that makes the employee unable to perform the essential functions of the job
- The inability to perform the essential functions of the job is unique to self-care leave



# FMLA Compliance Essentials

## Self Care FMLA Leave

**Eligibility.** Not every type of employer is required to provide self-care leave or can be sued by an employee for not providing the leave.

- The U.S. Supreme Court has twice ruled on the limits for enforcing the FMLA against a state government employee.
- In 2003, it ruled that the FMLA applies to state government employers for the family care provisions.
- In 2012, it ruled that this was not the case for the self-care provisions. Basically, the court said employees cannot sue their state employer for denying self-care leave.

**Bottom line:** State employees cannot sue for monetary damages, *but* the DOL can, and employees can get an injunction if leave is denied.



# FMLA Compliance Essentials

## What is a serious health condition?

**Serious health condition** is an illness, injury, impairment, or physical or mental condition that involves:

- Inpatient care in a hospital, hospice, or residential medical care facility
- Continuing treatment by a health care provider
- Continuing treatment includes either a follow-up with a health care provider or a drug regimen such as a prescription for medication



# FMLA Compliance Essentials

## Birth, adoption or foster child placement

**Birth or adoption.** Employees can take FMLA leave following the birth, adoption, or foster care placement of a child.

- An employee's entitlement to FMLA leave for birth and bonding expires 12 months after the date of birth.
- Both mothers and fathers have the same right to take FMLA leave for the birth, adoption or foster placement of a child.
- Birth and bonding leave must be taken as a continuous block of leave unless the employer agrees to allow intermittent leave such as allowing a parent to return to work on a part-time schedule.



# FMLA Compliance Essentials

## Birth, adoption or foster child placement

**Birth or adoption.** Employees can take FMLA leave following the birth, adoption, or foster care placement of a child.

- FMLA leave may be taken before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed.
- This includes FMLA leave to travel to another country for an international adoption.
- FMLA leave may also be taken to talk with adoption agencies, undergo required exams or attend court sessions where the adoption is discussed or approved.
- Foster care placements follow the same rules as adoption – that is, time off is allowed to attend to legal matters related to the foster care process.



# FMLA Compliance Essentials

## Leave to care for spouse or immediate family member

**Care for a spouse or immediate family member.** Employees may take FMLA leave to care for a spouse, parent, child, or other immediate family member suffering from a serious health condition.

- An employee **must be needed** to provide care for the spouse, son, daughter, or parent because of the family member's serious health condition in order for the employee to take FMLA leave.
- An employee may be needed when the family member is unable to care for his or her own medical, safety or other needs, because of the serious health condition or needs help in being transported to the doctor; or to **provide psychological comfort and reassurance** to the family member with a serious health condition.



# FMLA Compliance Essentials

## Leave to care for spouse or immediate family member

### Who is a spouse?

- Spouse means a husband or wife as defined or recognized in the state where the individual was married and includes individuals in a same-sex marriage or common law marriage. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the United States if the marriage could have been entered into in at least one state.



# FMLA Compliance Essentials

## Leave to care for spouse or immediate family member

### Who is a parent?

- Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a child. This term does not include parents “in-law.”
- This is a far broader definition of parent than the common dictionary definition and reflects the DOL’s understanding of modern families.



# FMLA Compliance Essentials

## Leave to care for spouse or immediate family member

### Who is a son or daughter?

- Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave begins.
- Again, this goes far beyond the dictionary definition.





# FMLA Compliance Essentials

## Leave to care for spouse or immediate family member

**In loco parentis:** The FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for or financially support a child.

- Employees who have no biological or legal relationship with a child may stand in loco parentis to the child and be entitled to FMLA leave. Ex. Girlfriend's child
- An employee may take leave to care for someone who, although having no legal or biological relationship to the employee when the employee was a child, stood in loco parentis to the employee when the employee was a child, even if they have no legal or biological relationship. Ex. Grand step-parent



# FMLA Compliance Essentials

## Military Deployment

**Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty:**

- Childcare arrangement changes needed because a military member has been called to active duty
- Attending military ceremonies and briefings such as send-off ceremonies
- Making legal or financial arrangements such as wills, powers of attorney
- Spending time with the military member during periods of "Rest and Recuperation"
- Making arrangements to care for the parent of a military member whom the member previously cared for



# FMLA Compliance Essentials

## Military Deployment Specific FMLA Time Limits

**While 12 weeks unpaid leave is available for deployment needs – there are specific time limits for each type of leave:**

- **Seven days:** To address any issues arising from the military member's short-notice deployment (i.e., deployment within seven or less days of notice), employee may take leave for up to seven calendar days, beginning on the day the military member receives notice of deployment, to attend to any issue arising from the short-notice deployment.
- **Fifteen days:** To spend up to fifteen calendar days with a military member who is on Rest and Recuperation leave during covered active duty.



# FMLA Compliance Essentials

## Military Deployment Specific FMLA Time Limits

**While 12 weeks unpaid leave is available for deployment needs – there are specific time limits for each type of leave:**

- **Ninety days:** To attend post-deployment activities for up to 90 days following the termination of the military member's covered active duty, including attending arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military, and to address issues arising from the death of a military member, including attending funeral services for the military member.

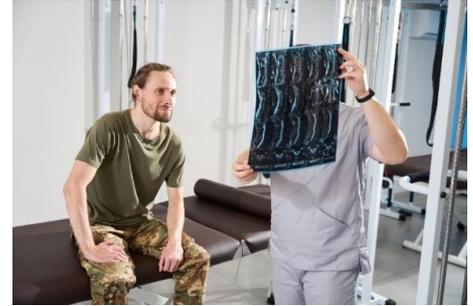


# FMLA Compliance Essentials

## Care for injured service member or veteran

**Care for injured:** An eligible employee may also take up to 26 workweeks of FMLA leave in a single 12-month period:

- To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (military caregiver leave).





# FMLA Compliance Essentials

## Care for injured service member or veteran

**Next of kin** is the nearest blood relative, other than the spouse, parent, son, or daughter, in the following order of priority:

- Blood relative who has been designated in writing by the servicemember for purposes of FMLA military caregiver leave
- Blood relatives who have been granted legal custody of the servicemember
- Brothers and sisters
- Grandparents
- Aunts and uncles
- First cousins



# FMLA Compliance Essentials

## Care for injured service member or veteran

**What is caregiver leave:** Military caregiver leave may be taken to care for a “covered servicemember” with a serious injury or illness. A covered servicemember may be either a current servicemember OR a veteran of the Armed Forces.

**Who is covered?** A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a *serious injury or illness*.

**Who is a covered veteran?** A covered veteran must have been discharged under conditions other than dishonorable within the five-year period before the employee is taking military caregiver leave to care for that veteran who is undergoing medical treatment, recuperation, or therapy for a *serious injury or illness*.



# FMLA Compliance Essentials

## Care for injured service member or veteran

**What is a serious injury for a current service member?** A serious injury or illness is one that was incurred by a servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

- A serious injury or illness also includes injuries or illnesses that existed before the servicemember's active duty and that were aggravated by service in the line of duty on active duty.



# FMLA Compliance Essentials

## Care for injured service member or veteran

**What is a serious injury for a veteran?** A serious injury or illness is one that was incurred by the veteran in the line of duty on active duty in the Armed Forces or that existed before the veteran's active duty and was aggravated by service in the line of duty on active duty, and that is either:

- A continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating.
- A physical or mental condition for which the veteran has received a Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater.



# FMLA Compliance Essentials

## Care for injured service member or veteran

### Continued:

- A physical or mental condition that substantially impairs the veteran's ability to work because of a disability, or disabilities related to military service or would do so absent treatment.
- An injury that is the basis for the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Any one of these definitions meets the FMLA's definition of a serious injury or illness for a veteran regardless of whether the injury or illness manifested before or after the individual became a veteran.



# FMLA Compliance Essentials

## Employer Obligations

**All covered employers must display a general notice about the FMLA (an [FMLA poster](#)).**  
**Covered employers who have employees who are eligible for FMLA leave must:**

- Provide employees with general notice about the FMLA
- Notify employees concerning their eligibility status and rights and responsibilities under the FMLA
- Notify employees whether specific leave is designated as FMLA leave and the amount of time that will count against their FMLA leave entitlement



# FMLA Compliance Essentials

## Employer Obligations

**To meet the general notice** requirements of the FMLA, covered employers must:

- Display a poster in plain view for all workers and applicants to see.
- Notifying them of the FMLA provisions and providing information concerning how to file a complaint with the Wage and Hour Division.
- A covered employer must display this poster even if it has no eligible employees.
- The poster may be posted electronically, and the general notice may be distributed.



# FMLA Compliance Essentials

## Employer Obligations

**In addition to displaying a poster**, a covered employer who has any eligible employees also must:

- Provide a general notice containing the same information that is in the poster in its employee handbook (or other written material about leave and benefits).
- If no handbook or written leave materials exist, the employer must distribute this general notice to new employees upon hire.



# FMLA Compliance Essentials

## Leave designation

### Leave designation and eligibility notice:

Once an employee's eligibility is determined a notice of eligibility status must be provided the first time the employee takes leave for an FMLA-qualifying reason in the employer's designated 12-month leave year.





# FMLA Compliance Essentials

## Leave designation

**The eligibility notice may be either oral or in writing and must:**

- Be provided within five business days of the initial request for leave or when the employer acquires knowledge that an employee leave may be for an FMLA-qualifying reason
- Inform the employee of his or her eligibility status
- If the employee is determined to be not eligible for FMLA leave, state at least one reason why



# FMLA Compliance Essentials

## Leave designation

**The eligibility notice may be either oral or in writing and must:**

- Be provided within five business days of the initial request for leave or when the employer acquires knowledge that an employee leave may be for an FMLA-qualifying reason
- Inform the employee of his or her eligibility status
- If the employee is determined to be not eligible for FMLA leave, state at least one reason why
- If the employee requests leave for a different qualifying reason in the same leave year and the employee's eligibility status has changed, the employer must notify the employee of the change in eligibility status within five business days



# FMLA Compliance Essentials

## Leave designation

### The leave designation must include:

- The employer's designation determination, and any substitution of paid leave and/or fitness for duty requirements
- Provide the amount of leave that is designated and counted against the employee's FMLA entitlement, if known
- If the amount of leave is not known at the time of the designation, the employer must provide this information to the employee upon request, but no more often than once in a 30-day period and only if leave was taken in that period



# FMLA Compliance Essentials

## Employee rights

**Each time employers provide the eligibility notice**, they must also provide employees with a rights and responsibilities notice, notifying employees of their obligations concerning the use of FMLA leave and the consequences of failing to meet those obligations.



# FMLA Compliance Essentials

## Employee rights and responsibilities

**The rights and responsibilities notice must be in writing and must include:**

- Notice that the leave may be counted as FMLA leave
- The employer's designated 12-month period for counting FMLA leave entitlement
- Any requirement for the employee to furnish a certification and the consequences for failing to do so
- Information regarding the employee's right or the employer's requirement for substitution of paid leave and conditions relating to any substitution, and the employee's right to take unpaid FMLA leave if the conditions for paid leave are not met



# FMLA Compliance Essentials

## Employee rights and responsibilities

**The rights and responsibilities notice must be in writing and must include:**

- Instructions for making arrangements for any premium payments for maintenance of health benefits that the employee must make during leave (and potential employee liability if the employee fails to return to work after FMLA leave)
- Notice of designation as “key” employee and what that could mean
- The employee’s right to job restoration and maintenance of benefits



# FMLA Compliance Essentials

## DOL FMLA Notice Resources

**General Notice, the FMLA poster** – satisfies the requirement that every covered employer display or post an informative general notice about the FMLA. This notice can also be used by employers with eligible employees to satisfy their obligation also to provide FMLA general notice to employees in written leave guidance (e.g., handbook) or individually upon hire.

**Eligibility Notice, form WH-381** – informs the employee of his or her eligibility for FMLA leave or at least one reason why the employee is not eligible.



# FMLA Compliance Essentials

## DOL FMLA Notice Resources

**Rights and Responsibilities Notice, form WH-381** (combined with the Eligibility Notice) – informs the employee of the specific expectations and obligations associated with the FMLA leave request and the consequences of failure to meet those obligations.

**Designation Notice, form WH-382** – informs the employee whether the FMLA leave request is approved; also informs the employee of the amount of leave that is designated and counted against the employee's FMLA entitlement. An employer may also use this form to inform the employee that the certification is incomplete or insufficient and additional information is needed.



# FMLA Compliance Essentials

## Certifications

**Given how many forms of FMLA leave are available**, it's sometimes hard to decide whether you have the right information. That's especially true when leave is for self-care or to care for a family member. That's why it's essential to get a certification from a health care provider that confirms a serious health condition exists.

- You have the right to request a FMLA certification of need
- You may also request a second certification
- If the second does not confirm eligibility, you can request a third, tie-breaking certification
- You may for the second and third certifications and you cannot use a doctor you ordinarily use for other purposes



# FMLA Compliance Essentials

## Certifications

### *Certification of Healthcare Provider for a Serious Health Condition*

Employee's serious health condition, form WH-380-E – use when a leave request is due to the medical condition of the employee.

Family member's serious health condition, form WH-380-F – use when a leave request is due to the medical condition of the employee's family member.



# FMLA Compliance Essentials

## Certifications

### *Certification of Military Family Leave*

Qualifying Exigency, form WH-384 – use when the leave request arises out of the foreign deployment of the employee's spouse, son, daughter, or parent.

Military Caregiver Leave of a Current Servicemember, form WH-385 – use when requesting leave to care for a family member who is a current service member with a serious injury or illness.

Military Caregiver Leave of a Veteran, form WH-385-V – use when requesting leave to care for a family member who is a covered veteran with a serious injury or illness.

# Q&A Break

# **FMLA** *Master Class*

## **Certifying & Controlling Intermittent Leave**



# Certifying & Controlling Intermittent Leave

## What is intermittent leave?

Intermittent FMLA leave is available for the employee's own medical condition or to care for a spouse, child or parent for a single qualifying reason.





# Certifying & Controlling Intermittent Leave

## What is intermittent leave?

FMLA leave for a specific serious health condition is taken two ways – either in a solid block of time or on an intermittent basis. Some examples:

- Joe has a heart attack and is admitted to a hospital. The heart attack and treatment qualifies for self-care FMLA leave as a serious health condition. Joe's time in the hospital means he is taking a block of FMLA leave.
- Joe's doctor orders cardiac rehabilitation as part of his treatment and recovery. Rehab occurs three days per week 8 a.m. to 9 a.m. for 12 weeks. Joe's work begins at 8:30 every morning. His rehab time is intermittent FMLA leave.



# Certifying & Controlling Intermittent Leave

## What is intermittent leave?

FMLA leave for a specific serious health condition is taken two ways – either in a solid block of time or on an intermittent basis. Some examples:

- Jane's elderly mother, June, undergoes cancer treatment while hospitalized. June is released from the hospital after a week and has to undergo chemo once a week for six weeks. She cannot drive and has asked Jane to take her to the appointments.
- Jane requested one week of FMLA leave to sit with her mother, deal with doctors and provide moral support. This is a block of FMLA for her mother's serious health condition.



# Certifying & Controlling Intermittent Leave

## **What is intermittent leave? Jane and June continued**

Jane requests a half day off per week to take June to chemo. This is a form of intermittent leave. Fortunately, it is predictable. Her employer can schedule around her weekly absence.



# Certifying & Controlling Intermittent Leave

## What is intermittent leave? More examples

Josiah is a recovering substance abuser, having become addicted to a prescription drug. As part of his continued therapy, he attends group counseling sessions, meetings with his medical provider and a medication prescription clinic. He has also relapsed twice, when he was hospitalized after overdoses. Josiah:

- Suffers from a serious health condition making him eligible for self-care FMLA leave
- Can take a block of FMLA leave when hospitalized with overdoses
- Can take intermittent FMLA leave for counseling, doctors' appointments and medication administration



# Certifying & Controlling Intermittent Leave

## What is intermittent leave? More examples

Josephine suffers from migraine headaches. Her doctor has prescribed medication and rest in a dark, quiet room when the migraines strike. He estimates that she will have a migraine between one and two times per week and that each episode will last 4 hours. Josephine:

- Has a serious health condition qualifying for FMLA self-care
- Does not require a block of FMLA leave but does need intermittent leave on an unpredictable schedule (she doesn't know when migraine will hit) but the number of episodes per week *is* predictable (1-2 per week)



# Certifying & Controlling Intermittent Leave

## Intermittent leave is **NOT** available for some FMLA reasons

Intermittent FMLA leave is not a right for some forms of FMLA leave:

- Workers cannot demand intermittent leave for the birth, adoption or foster care placement of a child. For example, a new mother cannot demand a half-time schedule after giving birth – she must take the bonding leave in a solid block of time. Thus, if her regular schedule is 40 hours per week, she may take 12 40-hour weeks off – not 24 20-hour weeks.
- Employers may **voluntarily** allow intermittent leave for birth, adoption or foster care placement.



# Certifying & Controlling Intermittent Leave

## **Intermittent leave and birth, adoption, or foster care example**

Carmen is pregnant with her first child. She works a full-time schedule, 40 hours per week. Her due date is June 1. Carmen schedules routine maternity visits after work whenever possible to save up FMLA leave for bonding until her 8<sup>th</sup> month, when she was required to make weekly OB visits during working hours. Each visit took up 2 hours.

- Her after hour visits are not counted against FMLA leave
- Her 8 weekly working hours OB visits (16 hours or 2 days total) are intermittent FMLA leave and count against her 12 weeks or 60 days, leaving her with 58 days



# Certifying & Controlling Intermittent Leave

## **Intermittent leave and birth, adoption, or foster care example**

Carmen gives birth June 1, returns home June 2 with a newborn and her doctor says she cannot physically return to work until her 6-week post-partum checkup.

- Carmen uses a block of FMLA leave for those 6 weeks (6 times 5 or 30 workdays) – leaving her with 28 workdays left



# Certifying & Controlling Intermittent Leave

## **Intermittent leave and birth, adoption, or foster care example**

Carmen needs the money, so she goes back to work. When the baby turns 6 months, she comes into a small inheritance and wants to bond better with her baby. She requests part-time work for the next six months.

- Her employer can reject her request for intermittent bonding FMLA leave even though she has 28 workdays (5.6 weeks) of leave left. She is eligible for a block of leave of 5.6 weeks, with guaranteed right of reinstatement.



# Certifying & Controlling Intermittent Leave

## **Intermittent leave and birth, adoption, or foster care example**

Carmen then requests 3 full weeks (15 workdays) of bonding leave. Her employer thinks it's too late to request bonding leave, arguing she lost the right when she returned to work after the initial six weeks.

- Her employer must grant the request because bonding leave is available anytime during the first year of the new, adopted or fostered child's life with the employee.
- Carmen takes the 3 full weeks of block FMLA leave and has 13 workdays (28-15 workdays) left.



# Certifying & Controlling Intermittent Leave

## **Intermittent leave for personal illness**

Carmen develops a rare disease and must travel out of town for a series of tests over the next few months. She requests intermittent leave of one day off per week for the next 4 weeks.

- Her employer must grant the request – but can request a certification from her health care provider showing her new condition is a serious health condition that requires intermittent leave. She uses another 4 days of FMLA leave, leaving 9 more days in the FMLA year.



# Certifying & Controlling Intermittent Leave

## **Intermittent leave for military deployment**

Carmen's husband received call-up orders for deployment for his National Guard Unit. Carmen requests intermittent leave to arrange for daycare for her child that her husband had previously provided. She wants to visit several day care centers to pick the best one and needs 4 days to do so.

- This is intermittent leave under the FMLA for military deployment exigencies. She can take up to seven of her 9 remaining days of FMLA
- Her employer can request a copy of her husband's military orders to verify the leave request. Her employer grants the request, leaving her with 5 workdays of leave



# Certifying & Controlling Intermittent Leave

## **Intermittent and block leave for military caregiving**

Carmen's husband is tragically seriously injured while on active duty and is sent to a Walter Reed hospital to recuperate. Carmen lives and works in Pennsylvania. She requests a block of FMLA leave of 4 weeks to sit by his side and consult with his doctors on his care.

- Her employer must provide the leave. For injured military spouses, workers are entitled to a total of 26 weeks of FMLA leave. Carmen had one workweek of FMLA left from her 12-week allotment and then another 14 of military injury leave.
- After her 4-week block of leave, she has no regular or military exigency leave left, but still 11 weeks of military injury leave.



# Certifying & Controlling Intermittent Leave

## Certifications related to intermittent leave

**Given how many forms of FMLA leave are available**, it's sometimes hard to decide whether you have the right information. That's especially true when leave is for self-care or to care for a family member. That's why it's essential to get a certification from a health care provider that confirms a serious health condition exists.

- You have the right to request a FMLA certification of need
- You may also request a second certification
- If the second does not confirm eligibility, you can request a third, tie-breaking certification
- You may for the second and third certifications and you cannot use a doctor you ordinarily use for other purposes



# Certifying & Controlling Intermittent Leave

## Self-care & intermittent leave

**Self-care.** Employees who suffer from a serious health condition may take up to 12 weeks of unpaid FMLA leave. This is the so-called self-care provision.

- One of the most frequently taken forms of FMLA leave
- Requires a serious health condition that makes the employee unable to perform the essential functions of the job.
- The inability to perform the essential functions of the job is unique to self-care leave



# Certifying & Controlling Intermittent Leave

## Leave to care for spouse or immediate family member including intermittent leave

**Care for a spouse or immediate family member.** Employees may take FMLA leave to care for a spouse, parent, child, or other immediate family member suffering from a serious health condition.

- An employee **must be needed** to provide care for the spouse, son, daughter, or parent because of the family member's serious health condition in order for the employee to take FMLA leave.
- An employee may be needed when the family member is unable to care for his or her own medical, safety or other needs, because of the serious health condition or needs help in being transported to the doctor; or to provide psychological comfort and reassurance to the family member with a serious health condition.



# Certifying & Controlling Intermittent Leave

## DOL FMLA Notice Resources

**General Notice, the FMLA poster** – satisfies the requirement that every covered employer display or post an informative general notice about the FMLA. This notice can also be used by employers with eligible employees to satisfy their obligation also to provide FMLA general notice to employees in written leave guidance (e.g., handbook) or individually upon hire.

**Eligibility Notice, form WH-381** – informs the employee of his or her eligibility for FMLA leave or at least one reason why the employee is not eligible.



# Certifying & Controlling Intermittent Leave

## Prerequisites to intermittent leave

In order to grant intermittent leave, employers need to know that the employee or relative suffers from a serious health condition. These June 2020 provide much more information than previously. Each allows the provider to select type of leave (block or intermittent)

### *Certification of Healthcare Provider for a Serious Health Condition*

Employee's serious health condition, form WH-380-E – use when a leave request is due to the medical condition of the employee.

Family member's serious health condition, form WH-380-F – use when a leave request is due to the medical condition of the employee's family member.



# Certifying & Controlling Intermittent Leave

## Frequency of certifications for intermittent leave

Intermittent leave is handled differently than other forms of FMLA leave. Here are some of the certification rules:

- When a medical provider says a condition will last more than 30 days (typical for intermittent leave) the employer must wait until the end of the time frame. For example, a medical certification for physical therapy might state therapy two days per week for 90 days. The employer could ask for a new certification at 90 days. by the employee.
- If the certified duration is more than six months, the employer may require recertification every six months.



# Certifying & Controlling Intermittent Leave

## **Frequency of certifications for intermittent leave**

Some chronic conditions that make employees eligible for intermittent leave last indefinitely. In that case the employer may request a recertification once per year. This is true even if the employee has not taken any intermittent leave in that one-year period.



# Certifying & Controlling Intermittent Leave

## Frequency of certifications for intermittent leave

The regulations also allow an employer to request recertification in less than 30 days if:

- The employee requests an extension of leave
- The circumstances described in the previous certification have changed significantly
- If the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification



# Certifying & Controlling Intermittent Leave

## Frequency of certifications for intermittent leave

Janie takes six weeks of FMLA leave for a cancer operation and treatment and gives her employer a medical certification that states that she will be absent for six weeks.

Because her certification covers a six-week absence, her employer cannot ask for a recertification during that time. At the end of the six-week period, Janie asks to take two more weeks of FMLA leave; her employer may properly ask Janie for a recertification for the additional two weeks.



# Certifying & Controlling Intermittent Leave

## Frequency of certifications for intermittent leave

Joe takes eight weeks of FMLA leave for a back operation and intensive therapy and gives his employer a medical certification that states that he will be absent for eight weeks.

- At the end of the eight-week period, Joe tells his employer that he will need to take three days of FMLA leave per month for an indefinite period for additional therapy; his employer may properly request a recertification at that time.



# Certifying & Controlling Intermittent Leave

## Frequency of certifications for intermittent leave

Joe takes eight weeks of FMLA leave for a back operation and intensive therapy, and gives his employer a medical certification that states that he will be absent for eight weeks.

- Six months later, and in connection with an absence for therapy, the employer may properly ask Joe for another recertification for his need for FMLA leave.



# Certifying & Controlling Intermittent Leave

## **Frequency of certifications for intermittent leave – fitness-for-duty**

An employer may require a fitness-for-duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if:

- Reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the condition for which leave was taken

This is a rare scenario. Generally, employers cannot require a fitness certificate after a single episode of intermittent leave even if they can after a solid block of FMLA leave



# Certifying & Controlling Intermittent Leave

## Notice for intermittent leave

Intermittent leave for chronic health conditions that flare up from time to time is difficult to manage because of its unpredictability. But employees authorized for intermittent leave cannot simply not show up. Employers may request advance notice as they do for other sudden absences including:

- Requiring calling in before the start of a scheduled shift
- As soon as possible if calling beforehand is impossible



# Certifying & Controlling Intermittent Leave

## **Handling future disability**

Remember that employers MAY NOT consider future FMLA usage when making hiring or employment decisions. That includes the need for intermittent FMLA leave. Employers must also consider the Americans with Disabilities Act and other laws protecting disabled or potentially disabled applicants and employees.



# Certifying & Controlling Intermittent Leave

## **Intermittent leave and cutting down scheduled hours**

New guidance from DOL answers a common question: Can an employee who has a chronic serious health condition that limits work to 8 hours per day use intermittent leave every day and avoid longer work days indefinitely?

The answer is "Yes" per the opinion letter

<https://www.dol.gov/agencies/whd/opinion-letters/search?FMLA>



# Certifying & Controlling Intermittent Leave

## **Intermittent leave and cutting down scheduled hours**

An eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day (or week) for an indefinite period of time as long as the employee does not exhaust their FMLA leave entitlement.

“In this case, if an employee would normally be required to work more than eight hours a day but is unable to do so because of an FMLA-qualifying reason, the employee may use FMLA leave for the remainder of each shift, and the hours which the employee would have otherwise been required to work are counted against the employee’s FMLA leave entitlement.”



# Certifying & Controlling Intermittent Leave

## **Intermittent leave and cutting down scheduled hours**

The employer asking for the Opinion Letter said that his employees work a schedule that includes regular mandatory overtime. The employer also noted that it deducts these worker's approved FMLA leave from a bank of 480 hours per eligibility year.

DOL said this is wrong! It noted that the FMLA provides up to 12 **work weeks** of unpaid leave per eligibility year. Those workweeks, if converted to an hourly number, would be more than 480 hours.

**For example, an employee who ordinarily works 50 hours per week would be entitled to 600 hours of FMLA leave in a 12-month period.**

# FMLA

*Master Class*

## **Managing Accommodations, Preventing Abuse**



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

Employees who have used FMLA leave and are returning to work are:

- Protected from retaliation for having taken leave
- Protected from retaliation for potentially needing leave
- Entitled to the same or a substantially equivalent position
- Cannot be subjected to a fitness for duty exam unless all other returning workers are, **and** worker was notified at time of FMLA leave request approval



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

What is retaliation?

- The FMLA makes it illegal for employers to retaliate against employees for exercising their FMLA rights.





# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

What is retaliation?

- When a federal employment law refers to retaliation, it's generally defined as some form of work-related punishment that is severe enough to dissuade someone from doing the thing that led to the punishment.



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

What is retaliation? Other examples:

- Being moved from the day shift to the night shift when that interferes with known childcare arrangements
- Being moved from the night shift to the day shift when the move means loss of a shift differential
- Being assigned tasks that are uniquely dangerous, unpleasant or otherwise undesirable
- Being subjected to name calling, slurs or other bullying behavior by co-workers following protected activity like reporting harassment



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

Generally, employees can more easily prove retaliation than underlying discrimination. Retaliation is a favorite plaintiff's claim because of that and:

- Doesn't require proof that the discrimination occurred – only that the employee had a “good faith” belief that it did, and that the employer retaliated because of the complaint or report.
- FMLA example: Jane tells her supervisor that her favorite uncle is ill and requests FMLA leave to care for him. Supervisor correctly denies leave and then demotes Jane. Jane sued, alleging retaliation, arguing she thought uncles counted for FMLA leave. Jane has a retaliation case, but not an FMLA claim.



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

Bottom line – any punishment for asking for, using or potentially using FMLA leave in the future may mean liability for retaliation. Best move:

- Train all supervisors and managers on what retaliation is
- Remind them that FMLA is an entitlement and must not be interfered with
- Have a process to review all adverse employment actions *before* they go into effect to assure those who have used FMLA or invoked any potential FMLA claim are not punished for doing so
- Always support all potentially adverse actions with solid business reasons



# Managing Accommodations, Preventing Abuse

## **FMLA obligations on return**

Example: Meg has been struggling to keep up with her work over the last year. Her performance has deteriorated as evidenced by falling productivity, increased error rates, and other poor work. Her supervisor has started the disciplinary process and has recommended that Meg be discharged. Meanwhile, Meg asks for FMLA leave to care for her mother.



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

Example: Meg takes her FMLA leave and returns to work. She is discharged on day one. Meg sued, alleging retaliation for taking protected FMLA leave. But the employer wins the case because:

- It showed the court that it was already in the process of terminating Meg and had records to back up the process
- It showed the court that other employees with similar disciplinary problems had been treated the same – that is, Meg was not singled out for discharge while others who did not take FMLA leave were punished more leniently



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return – recent case example

Case: When Clay County, Texas elected a new sheriff, he reviewed staffing and determined he would remove several supervisors when his term began. He emailed those supervisors to let them know, including Linda.

- Linda then asked for a month of FMLA leave, which was approved by the outgoing administration.
- Linda showed up for work a month later, about two weeks after the new sheriff took office. She was told that she no longer had a job to return to because her job had been eliminated.
- Linda sued, alleging interference with her right to FMLA leave. The 5<sup>th</sup> Circuit Court of Appeals said she had no reinstatement rights because the county had shown it legitimately terminated her for reasons unrelated to leave.
- The employer could have terminated her during leave, too. The case is [\*Byrd v. Clay County\*](#).



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

What is the same or a substantially equivalent position?

- The FMLA is an entitlement law – those who qualify are “entitled” the leave and all other rights outlined. It does not matter if the employer is inconvenienced.
- Part of the entitlement is the right to reinstatement at the end of the leave.
- Reinstatement must be to the same or an equivalent position.



# Managing Accommodations, Preventing Abuse

## **FMLA obligations on return**

What is the same or a substantially equivalent position?

- Most employers hold the job the leave-taking worker held before taking leave
- The employee would then simply return to the same tasks, schedule, pay and benefits as if he never took leave



# Managing Accommodations, Preventing Abuse

## **FMLA obligations on return**

What is the same or a substantially equivalent position?

- Some employers may choose to place the returning employee in another position – especially if they had a critical need for someone to perform the job while the employee was out.
- The new job must have the same pay, duties, responsibilities and schedule as the job the leave taker left behind.



# Managing Accommodations, Preventing Abuse

## **FMLA obligations on return**

There is no right to reinstatement if:

- The employee cannot return to work at the end of leave and has no additional FMLA leave remaining.
- The employer has conducted a layoff or reduction in force or otherwise made changes to its workforce that resulted in the elimination of the position the employee held before going out on leave AND can prove that the reason for the change was a legitimate business one unrelated to the FMLA leave.



# Managing Accommodations, Preventing Abuse

## **FMLA obligations on return**

This does not mean you can automatically terminate the employee – it only means they lost the right to be returned to the same or an equivalent position.

- Consider other laws under which the employee may be entitled to more leave, including the ADA, the PWFA and any other state laws.



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

**Example One:** Joey took FMLA leave for cancer treatment. He had 12 weeks available and took all 12 weeks of leave, but his doctors say he cannot yet return to work. He then used up his remaining vacation leave and an additional 30 days of unpaid leave under the ADA (more on that later).

- Joey then is cleared for work. However, his employer reassigns him to another position with different hours because it filled his old job when he didn't return at the 12-week mark.
- Joey sues, alleging failure to reinstate. Joey loses because he lost the right to reinstatement under the FMLA when he didn't return.



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

**Example Two:** Frank takes 12 weeks FMLA child-bonding leave. Meanwhile, a pandemic hits and the governor orders all non-essential businesses to shut down. The employer lays off all employees, including Frank. His job no longer exists. He does not have the right to return to the same or a similar position.

**Caveat:** If the employer begins to rehire staff after the governor lifts the shut-down, it must recall and rehire workers without regard to past or suspected future FMLA usage. Otherwise, that would be retaliation.



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

What is fitness-for-duty?

Some employers want to be sure that those returning from FMLA for self-care leave are ready to resume their duties fully. They therefore require a fitness for duty certification before return.





# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

What is fitness-for-duty?

- The employer may have a policy or practice that requires employees in similar job positions who take leave for similar health conditions to provide a return to work, or “fitness-for-duty,” certification from the employee’s health care provider showing that the employee is able to resume work.
- **You may not single out only those who take FMLA leave for the requirement – all similarly situated employees must have to meet the same requirement.**



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

What is fitness-for-duty?

- The employer may request a fitness- for-duty certification **only** with regard to the particular health condition that caused the employee’s need for FMLA leave.
- **You may not ask about any other medical condition. For example, if the employee took FMLA leave for a broken foot, you may not ask the doctor to certify fitness-for-duty for the employee’s diabetes or heart disease.**



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

What is fitness-for-duty?

- If the employer requires a fitness-for-duty certification, it must provide notice of that requirement and whether the certification must address the employee's ability to perform the essential functions of his or her job with the FMLA designation notice.
- Not included with designation notice? You cannot ask.
- Fitness-for-duty notice didn't specify ability to perform essential functions? And include a list? Then all employer can demand is a Yes or No answer.



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

What is fitness-for-duty?

- As long as the employer has provided the required notice regarding any fitness-for-duty certification requirement, the employee's return to work may be delayed until the fitness-for-duty certification is provided.
- An employer may contact an employee's health care provider to clarify or authenticate a fitness-for-duty certification; but cannot delay the employee's return to work while making that contact.



# Managing Accommodations, Preventing Abuse

## FMLA obligations on return

What is fitness-for-duty?

- An employer may not require second or third opinions for a fitness-for-duty certification.
- The employee is responsible for paying any cost of obtaining the fitness-for-duty certification.
- **Bottom line:** You must let employee know about fitness-for-duty requirement up-front and may only challenge the authenticity of the returned form – not the content. Once the employee says she's ready and presents the certificate, do not delay return.



# Managing Accommodations, Preventing Abuse

## When FMLA leave runs out

Options for managing additional leave needs:

- Allowing employees to take additional paid or unpaid time off as needed.
- Letting employees work flexible schedules to make up hours in the evening and on weekends.
- Adjusting an employee's job responsibilities and/or hours on a semi-permanent basis.
- When job duties permit, allowing an employee to work remotely as needed.

# Q&A Break



# Breaking News

## FMLA Opinion Letter

### DOL Opinion Letter.

On January 17, 2025, the DOL [issued an opinion letter](#) designed to help employers integrate the FMLA with state and local leave laws. The letter acknowledges that under the FMLA, employees can elect, and employers can require workers to accrued vacation, sick and workers' comp leave for unpaid FMLA leave.



# Breaking News

## FMLA Opinion Letter

The letter then explains how payments under state and local leave laws must be handled.

- **FMLA designation.** If the employee takes paid leave under a state or local leave law for a condition covered by the FMLA, employers must designate it as FMLA leave and let the employee know. Just as if the employee was taking unpaid FMLA leave, the employer must send a designation letter showing how much FMLA leave is being used.



## FMLA Opinion Letter

The letter then explains how payments under state and local leave laws must be handled.

- **Topping off pay.** If the state or local leave payment does not entirely replace pay, the employee may use available PTO to top it off. The employer can't force the employee to take PTO for the state-paid portion, though.
- **Different coverage.** Employers may not run FMLA concurrent with a state or local leave law that covers different conditions than the FMLA covers.



## Breaking News

### FMLA Opinion Letter

Here's how this would work. Amy takes 8 weeks FMLA to care for mom. Designate this as FMLA leave. Her state provides equivalent leave, with partial pay for 6 weeks. Amy can use vacation leave to top off state paid leave for six weeks, then more employer-paid leave for the remaining two weeks. She can never receive more paid leave than she receives while not on leave.

**Bottom line:** Tell workers how you will handle substituting PTO for FMLA leave when workers also receive state or local paid leave for FMLA covered reasons. Also explain that if the state or local law covers other conditions (like leave for bereavement or to care for a friend who is ill) that this won't impact their FMLA entitlement.



# Managing Accommodations, Preventing Abuse

Allowing employees to take additional paid or unpaid time off as needed.

Employers are allowed to be generous – with limits

- If you do allow additional leave for other reasons (i.e. for those who didn't take FMLA leave) you must not deny such leave to those who took FMLA. That could be retaliation or interference with the right to take FMLA leave.
- Singling out FMLA leave takers for any different treatment is a big red flag.



# Managing Accommodations, Preventing Abuse

Letting employees work flexible schedules to make up hours in the evening and on weekends

Flexible scheduling, working from home or working on weekends are options but NOT required under the FMLA

- All of these may be required, however, under the ADA as reasonable accommodations.
- There is interplay between ‘serious health condition’ and ‘ADA disability.’
- **All disabilities are serious health conditions, but not all serious health conditions are disabilities.**



# Managing Accommodations, Preventing Abuse

## Changing job responsibilities

Adjusting an employee's job responsibilities and/or hours on a semi-permanent basis.

- You can only do this if the returning employee has exhausted his or her FMLA entitlement and cannot return to the job and perform all its essential functions.
- Why? Making any changes to the job would be interfering with the right to return to the same or an equivalent position and might be considered retaliation, too.
- Answer? Document the employee's request for more time or accommodations, explain that he's losing the right to reinstatement by making the request and put the adjustments in writing for employee's acknowledgment.



# Managing Accommodations, Preventing Abuse

## Remote work

When job duties permit, allowing an employee to work remotely as needed.

- This is a popular accommodation under the ADA but employers can offer it to employees returning from FMLA leave too.





# Managing Accommodations, Preventing Abuse

## Remote work

When job duties permit, allowing an employee to work remotely as needed.

- Example: Carla breaks a leg and takes FMLA leave for treatment and because she cannot drive to the office while in a thigh-high cast. Her broken leg qualifies as a serious health condition but is temporary and therefore not (yet) a disability. She takes 4 weeks of FMLA leave.
- Carla can return to work but needs physical therapy five days per week to bring her leg back to full function. Her commute is long. As a convenience, her employer suggests that Carla work from home around the therapy sessions for the six weeks she needs to go.



# Managing Accommodations, Preventing Abuse

## **Beware accusations of retaliation**

- Employees may perceive your offers of help getting them back to work as punishment for taking FMLA leave.
- Be sure to document everything – make clear that the employee requested more time, a different assignment – or whatever change you end up making.



# Managing Accommodations, Preventing Abuse

## Balancing FMLA rights and responsibilities with the Americans with Disabilities Act

### ADA/FMLA comparison

- FMLA is meant for temporary help for those with exigent circumstances – whether for personal illness, to care for a relative with an illness, to baby-bond or the adjust to a family military deployment, for example.
- The ADA is meant to make more permanent adjustments to a worker's job to allow him or her to perform the essential functions of the job despite long-term disabilities.



# Managing Accommodations, Preventing Abuse

## Balancing FMLA rights and responsibilities with the Americans with Disabilities Act

### ADA/FMLA comparison

- FMLA allows short-term leave to cope
- ADA makes long-term reasonable accommodations





# Managing Accommodations, Preventing Abuse

## How to handle extra time-off requests when an employee has been out on FMLA leave:

- If you are an FMLA-covered employer (with 50 or more employees), grant any remaining FMLA leave for the year.
- Request a return-to-work certification showing the employee is able to perform the job's essential functions. Remember, you must do this at the beginning of leave.
- If certification shows the employee can't perform essential functions move to an ADA analysis.



# Managing Accommodations, Preventing Abuse

## How to handle extra time-off requests when an employee has been out on FMLA leave:

Is the employee disabled?

- Under the ADA, ask does the condition substantially impair a major life function such as eating, walking, or breathing? The main difference between many FMLA serious health conditions and ADA disabilities is the apparent permanence – or at least long-term likelihood of the condition.
- If the condition is a disability, more time off **may be** a reasonable accommodation.



# Managing Accommodations, Preventing Abuse

**How to handle extra time-off requests when an employee has been out on FMLA leave:**

Other options include a reduced schedule or more breaks.

- If a doctor recommends more time off, be sure that recommendation spells out the anticipated length.
- If it's indefinite, you can reject the request.
- If it's specific, decide whether it would be reasonable under the circumstances. Do you have the staff and flexibility to provide the leave?



# Managing Accommodations, Preventing Abuse

## How to handle extra time-off requests when an employee has been out on FMLA leave:

### Example:

- Clara took 12 weeks FMLA when first diagnosed with breast cancer. She had surgery and chemo, leaving her with the inability to lift more than 10 pounds. Overhead work is part of the essential functions of her job.
- Clara's doctor recommends more time off for intense physical therapy to hopefully regain more motion in her arm. The recommendation is six weeks.
- Six weeks pass, and Clara has improved, but still cannot lift 10 pounds. She claims ADA permanent disability and requests reassignment to another position.



# Managing Accommodations, Preventing Abuse

## How to handle extra time-off requests when an employee has been out on FMLA leave:

Example:

- Clara's employer granted her the first extension of leave – making sure she understands this may mean she won't be reinstated to her old job.
- Clara's employer then begins the interactive accommodations process by determining if she's ADA disabled and entitled to other reasonable accommodations. This is a back-and-forth discussion.
- Clara's employer agrees to move her to another open position that doesn't include overhead work. This job does not have to be equivalent.



# Managing Accommodations, Preventing Abuse

## How to handle extra time-off requests when an employee has been out on FMLA leave:

- For example, an employee that has only been on the job for a few months won't qualify for FMLA, but employers should consider their ADA rights.
- The ADA provides time off even when the employee **has earned none!**
- **Do not** automatically conclude that those with no accrued time off or who have used it all up aren't eligible under the ADA for leave.



# Managing Accommodations, Preventing Abuse

## Handling FMLA fraud or abuse

**1. Obtain a medical certification** for each request for leave due to a serious health condition. It's important that your sick leave or attendance policy requires a doctor's certification for all absences of three or more days for the leave to be excused. If there's no such requirement and you intend to require paid leave to run concurrent with FMLA leave, you might not be able to require a medical certification, which is the first step in an anti-fraud program.



# Managing Accommodations, Preventing Abuse

## Handling FMLA fraud or abuse

**1. Obtain a medical certification:** Remember that you do not have to require a medical certification for FMLA leave – but it remains the best way to track, account for and accurately account for all FMLA leave. Otherwise, you face the prospect of employees using up all their paid leave *before* they begin tapping into their job-protected unpaid FMLA leave.



# Managing Accommodations, Preventing Abuse

## Handling FMLA fraud or abuse

**2. Enforce a policy** denying the leave request if an employee fails to submit certification within 15 days. In each instance, assess any appropriate penalties for failure to be at work. These penalties must, of course, apply to every similarly situated employees – not just those requesting FMLA leave.



# Managing Accommodations, Preventing Abuse

## Handling FMLA fraud or abuse

**3. Examine the certification closely** to ensure it's been properly and fully completed.

Many doctors will complete the form in a hurried fashion. In some cases, they'll intentionally leave some sections incomplete in order to remain “truthful” while accommodating the desires of the patient/employee for leave.



# Managing Accommodations, Preventing Abuse

## Handling FMLA fraud or abuse

### 3. Examine the certification closely:

- If the medical certification is incomplete, specify in writing what information is lacking and allow the employee at least seven days to cure the deficiency.
- If the employee fails to do so, deny the leave request. Of course, if the medical certification doesn't support the existence of a serious health condition, you should deny the request.
- You may have someone in HR contact the doctor's office but not the doctor to question the authenticity of the certification – but not request more medical details.



# Managing Accommodations, Preventing Abuse

## Handling FMLA fraud or abuse

- 4. Require a second opinion** if the circumstances are even slightly suspicious and it's an original certification.
- 5. Once the certification is approved**, make a limited inquiry each time the employee requests more leave, particularly in the case of intermittent leave. The goal is to determine whether the leave is for the same qualifying reason.



# Managing Accommodations, Preventing Abuse

## Handling FMLA fraud or abuse

**6. Watch the schedule of absences** closely in cases of intermittent leave to determine whether a suspicious pattern develops (e.g., immediately before and after weekends or days off) or whether there's a change in the frequency or timing. Such actions could suggest a change in condition that enables you to request a recertification.



# Managing Accommodations, Preventing Abuse

## Handling FMLA fraud or abuse

**7. Request recertifications** as often as the law allows. The frequency of recertification permitted will differ depending on the type of leave and the type of serious health condition.

**8. Require accrued leave to run concurrently** with FMLA leave when allowed by law. When an employee realizes that taking leave today will affect future vacation time, he or she is more likely to take FMLA only when the need is legitimate.



# Managing Accommodations, Preventing Abuse

## Handling FMLA fraud or abuse

**9. Ask the physician's office to verify** that the medical certification is exactly as he or she signed it and has not been altered.

**10. Be cautious about foreign certifications.** DOL does allow foreign certifications. Because the employee may be overseas when taken ill, or is caring for a parent overseas, this does happen fairly frequently. You may, however, request that the certification follow the DOL forms and that the worker have to responses translated from the foreign language into English.



# Managing Accommodations, Preventing Abuse

## Handling FMLA fraud or abuse

**11. Aggressively pursue potential fraud,** and if concrete evidence of fraud is discovered, take appropriate disciplinary action. Always follow up on reports from fellow employees or other sources that the employee does not, in fact, need leave.

**Final note:** Even if these actions uncover no fraud, your efforts will still reap dividends. Once employees become aware that you intend to use these tools to detect fraud, employees otherwise inclined to take advantage of the FMLA will wait until a legitimate need arises.



# Managing Accommodations, Preventing Abuse

**Is it or isn't it FMLA leave abuse?**

**Working a second job while on FMLA? It depends**

**Taking a cruise while on FMLA leave? It depends**

# FMLA

*Master Class*

## **Return to Work**



# Return to Work

## Health Insurance Continuation

- Congress recognized that workers taking FMLA leave would need to continue to access any health insurance coverage they had in place. If employees were to lose coverage while undergoing cancer treatment, for example, taking FMLA leave would be counter-productive.
- The FMLA includes a provision that calls for maintaining any existing health insurance during unpaid or paid FMLA leave.



# Return to Work

## Health Insurance Continuation

- This provision only applies to *existing* coverage – it does not require employers to furnish new health coverage.
- Unless the employer voluntarily or pursuant to the Affordable Care Act provides health insurance, there is no right to health insurance during FMLA leave.



# Return to Work

## Health Insurance Continuation

- Group health insurance must continue during FMLA leave on the same terms as if the employee continued working.
- Any changes to the plan that apply to *all employees* also apply to the worker on FMLA leave.
- For example, if FMLA leave bridges a new plan year, any changes to the plan also apply to the employee on FMLA leave. The employee may also change plans at that time if other employees can do the same.



# Return to Work

## Health Insurance Continuation

- If family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave.
- The employee must continue to make any normal contributions to the cost of the health insurance premiums. For example, if the employee usually pays 10% of the premium, he must continue to do so during FMLA leave in order to continue to receive coverage.



# Return to Work

## Health Insurance Payment

- Employer must pay its share of the premium as it did before the employee took FMLA leave.
- If the employee takes paid FMLA leave, the employee must pay the usual share as before. That is, if a payroll deduction is usually made, it would continue.
- If the employee takes *unpaid* FMLA leave, he or she must make arrangements to pay the normal employee portion of the insurance premiums in order to maintain insurance coverage. For example, the employee could mail a check to cover his share of the premium.



# Return to Work

## Health Insurance Payment

What if the employee doesn't pay the requisite share?

- Once the employee's premium share is more than 30 days late, the employee may lose coverage.
- Before dropping the employee's coverage, the employer must notify the employee that it has not received the payment, that the payment is 30 or more days late *and* that if the employee does not make good on the payment within 15 days of the date of the notice, coverage will be dropped.
- Thus, at a minimum, there is a possible 45-day grace period.
- Employers should send notice promptly.



# Return to Work

## Health Insurance Payment

What if the employee doesn't pay the requisite share?

- Employers should send notice promptly. Cutting off coverage without sending the notice violates the FMLA *and* may mean liability for unpaid medical bills if the coverage cannot be reinstated and the bills covered retroactively.

Example: Mary takes 12 weeks unpaid FMLA leave to give birth. She ordinarily pays \$200 per month as her share of health insurance. She develops complications as does the child, who remains in the ICU for several months. Mary neglects to send a check, but her employer does not send a warning notice. Mary's baby incurred \$1.5 million in medical bills after employer drops coverage.



# Return to Work

## Health Insurance Payment

In some instances, an employer may choose to pay the employee's portion of the premium, for example, in order to ensure that it can provide the employee with equivalent benefits upon return from FMLA leave.

- Failing to reinstate those benefits violates the FMLA requirement that employees be reinstated to an equivalent position – the reason you cannot provide coverage are irrelevant.
- If you have any doubt about being able to reinstate coverage on day one of return, the best bet is to pay the employee's share during leave.



# Return to Work

## Health Insurance Payment Recoupment

**General rule:** If the employer pays the employee's share of the health insurance premium for the employee during FMLA leave, the employer may recoup that once the employee is back to work.



# Return to Work

## Health Insurance Payment Recoupment

**WARNING:** Some states have very strict rules for what can come out of paychecks – while normally, insurance premiums are allowed, its possible that a lump sum repayment of premiums would be viewed differently. A state DOL might consider the deduction as payment for a loan rather than a premium.



# Return to Work

## Health Insurance Payment Recoupment

**WARNING:** In addition, if the deduction is so large that what remains is below minimum wage, it's a potential FLSA violation.

**DOL says:** "Employers at times require employees to pay or reimburse the employer for other items. The cost of any items which are considered primarily for the benefit or convenience of the employer would have the same restrictions as apply to reimbursement for uniforms. In other words, no deduction may be made from an employee's wages which would reduce the employee's earnings below the required minimum wage and overtime."



# Return to Work

## Health Insurance Payment Recoupment

**WARNING:** The question becomes – was the original employer’s payment of health insurance primarily for the benefit or convenience of the employer? If so, deduction may violate FLSA *if* it throws net pay under minimum wage or overtime wage.



# Return to Work

## Health Insurance Payment Recoupment

**Employee doesn't return to work:** Sometimes, an employee may choose not to return to work.

**DOL says:** In addition, the employer may require the employee to repay the employer's share of the premium payment if the employee fails to return to work following the FMLA leave unless the employee does not return because of circumstances that are beyond the employee's control, including a FMLA-qualifying medical condition.



# Return to Work

## Health Insurance Payment Recoupment

**Example:** An employee takes FMLA leave to give birth and bond with her baby. She informs her employer that she won't be returning to work on her last day of leave. Employer sends her a bill for her insurance portion and the employer's, which it has covered during her leave. The employer then immediately drops coverage. What could go wrong?

- **COBRA**
- **Mother has serious health condition**



# Return to Work

## Benefits other than Health Insurance

An employee's rights to benefits other than group health insurance while on FMLA leave depend upon the employer's established policies.

- Any benefits that would be maintained while the employee is on other forms of leave, including paid leave if the employee substitutes accrued paid leave during FMLA leave, must be maintained while the employee is on FMLA leave.
- This may include life insurance, retirement contributions and other fringe benefits.



# Return to Work

## Benefits Other than Health Insurance

**Caveat:** The FMLA provides that employees who return after leave must immediately be restored to the same benefits that they had before going on leave – with NO waiting period or requalification. In some cases, that may mean having to maintain those benefits even if not technically required under the FMLA. Why?

- **Life insurance:** If employer drops coverage, it must arrange for immediate reinstatement with no requalification. Does your carrier allow? If not, continue to cover cost or risk failure to reinstate claim.



# Return to Work

## Retirement Benefits

**Retirement benefits:** The FMLA also requires that retirement benefits must be restored at the same level when an employee returns from leave.

- FMLA leave does not have to be counted as hours worked or “time in service” for purposes of vesting, benefit accrual, or eligibility
- FMLA leave cannot be treated as a break in service for purposes of retirement plans
- If a retirement benefit requires an employee to be “employed” on a certain date to be credited with a year of service for vesting, contributions, or participation in the plan, employee on FMLA leave is “employed”



# Return to Work

## **FMLA leave does not confer special privileges**

The FMLA provides job-protected leave plus the right to reinstatement – which are entitlements. However, this does not mean that leave-takers are protected from ordinary workplace changes. Taking FMLA leave:

- Does not mean employees cannot be fired
- Does not mean employees cannot be disciplined
- Does not mean employers cannot conduct layoffs, reorganizations or reductions in force



# Return to Work

## **FMLA leave does not confer special privileges**

The key is that any personnel action must clearly be unrelated to the use of FMLA leave.



# Return to Work

## FMLA absence can reveal problems

When employees miss work, it's not uncommon that their employers discover performance problems.

**Example:** Court official never missed work and was responsible for collecting bail, fines and other money for twenty years. Then she got sick and took leave. Her temporary substitute discovered that the official embezzled hundreds of thousands over those years of service. Leave did not bar discipline and criminal charges.



# Return to Work

## **FMLA absence can reveal problems**

Other examples of workplace problems discovered during leave:

- Missing records
- Work undone
- Falsified time sheets
- Theft and other criminal activities



# Return to Work

## Pending discipline

Workers sometimes believe that they cannot be fired while on FMLA leave. This can mean:

- Employees decide to request and take FMLA leave to prevent discipline, thinking this will prevent their discharge
- Employees facing discipline develop genuine psychological distress, anxiety, insomnia, depression or related conditions that triggers the need to take FMLA leave for a serious health condition



# Return to Work

## Pending discipline

How should employers respond?

- Always approve FMLA leave if the request shows entitlement. That is, if the employee has a serious health condition, do not deny leave just because you believe this is just an attempt to avoid being fired
- Always follow exactly the same process as you would for any other FMLA leave request – i.e. notice, certification and so on



# Return to Work

## Pending discipline

What if you already decided to discharge?

- Check to make sure you have documented the discipline process. Did you prepare a memo? Was it produced and dated *before* the FMLA leave request? Had you discussed it with the employee?
- It's always safest to consult counsel before discharging someone already on FMLA leave
- Bottom line: If you are confident that you can prove you already made the discharge decision or would have made the decision whether the employee requested leave or not, you *can* go ahead with carrying through



# Return to Work

## Pending discipline

You can also decide to wait to discipline and discharge

- Might be best option for avoiding lawsuit - especially if you didn't carefully and contemporaneously document every aspect of disciplinary process or hadn't told the employee you were considering discipline. Why?
- Even winning a lawsuit costs money – and if the employee had no idea she was “in trouble” she’s going to suspect retaliation.
- Other option may include preparing a performance improvement plan once she returns to work or offering a last change agreement. The further removed from requesting, taking or returning to work a discharge is, the less likely it will be seen as retaliation.



# Return to Work

## Don'ts for discipline

Remember that you:

- **Should not** include any mention of missed deadlines during FMLA leave
- **Should not** count any FMLA absences towards no-fault attendance programs
- **Should** adjust deadlines and goals to account for protected FMLA leave absences
- **Should** specifically state in performance reviews that you adjusted for FMLA absences so that there is no negative impact



# Return to Work

## Layoffs and reorganizations

You can and should include workers currently on FMLA leave in reorganization and layoff planning.

- Focus on objective factors when coming up with reorganization plans.
- Don't count objective goals such as sales quotas without first subtracting time attributed to FMLA leave from those goals and quotas.
- DO NOT consider someone's past, present or potential future FMLA leave as a factor in a reorganization or layoff.
- DO look for potentially suspicious patterns such as before and after proportions of childbearing females.



# Return to Work

## Layoffs and reorganizations

Example: Jane takes FMLA leave to give birth. During her time off, the company undergoes a reorganization which eliminates 3 employees in her division. The employer's layoff list is based on the lowest-performing employee based on the last 3 years of performance reviews. Jane's rank is in the bottom 3 and thus her name appears on the layoff list. Her reviews didn't penalize past FMLA leave or downgrade her ranking for related attendance. She can be terminated as soon as the layoff is effective even if she has not yet returned from leave.



# Return to Work

## To sum up allowable discharges

- A reorganization that eliminates or restructures jobs, assigns new functions to some jobs, or eliminates others. FMLA requirements don't demand you retain workers you otherwise would terminate under a reorganization.
- Across the board budget reductions during economic downturns or simply a desire to maximize profit. As long as you don't use past or future FMLA leave as a factor, workers can be fired while on FMLA leave to cut costs.



# Return to Work

## To sum up allowable discharges

- Worker wrongdoing necessitating discipline. Employees don't get a pass because they're on FMLA leave. Be prepared to show you disciplined all workers who broke the same rule and didn't single out leave-takers, though. If you were finalizing a discharge based on insubordination when the worker requested FMLA leave, you can move forward.
- Poor productivity. But make allowances for time missed while on FMLA leave, ADA accommodations leave, or for military service absences. In other words, adjust quotas, goals, and sales targets to zero out the effect of lost time.



# Return to Work

## To sum up allowable discharges

- Discovery of mistakes or poor performance during FMLA leave. Sometimes, it takes an employee's absence to see that the worker wasn't doing the job you thought. An absence may mean the employer moves another worker into the position to get the work done. He or she may discover uncompleted or error-filled work or other irregularities. If you would terminate *any* employee over the errors or irregularities, you can terminate the employee even while on FMLA leave. She may then have been fired while on FMLA leave, but not *because* she was.



# FMLA and USERRA

## **USERRA spells trouble**

Example: Madeline, an attorney, joined the Army National Guard two months after being hired by a law firm. She was called to active duty for two years, assigned to Afghanistan. There, while assisting deployed soldiers with their legal problems, she was injured in a suicide bombing. She was sent home and underwent rehabilitation for 18 months after the end of her active duty.



# FMLA and USERRA

## **USERRA spells trouble**

She then told the law firm she had left she wanted to return. It reinstated her and adjusted her pay according to its pay schedule to account for missed time. Two months later, service-related complications required her to have surgery. The firm discharged her, telling her she wasn't eligible for FMLA leave. The law firm violated both the FMLA and USERRA. First, she should have received credit towards FMLA eligibility. Second, she wasn't fired for cause.



# New FMLA Poster

## In late April 2023 DOL updated the required FMLA poster

- New poster places emphasis on common worker FMLA questions. For example, it includes the statement that “You **do not have to share a medical diagnosis**” when requesting leave.
- Poster also makes it easy for workers to get more information from DOL.
- Poster includes a QR “Scan Me” code that takes workers directly to the DOL enforcement page if they scan the QR code with their smartphone.
- You can access the [new poster here](#).

# Questions?

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