



TOP TEN FMLA ALLIGATORS: *Challenges, Tips, and Traps*



Steven G. Meilleur, Ph.D., SPHR
Sr. VP Risk Services – HR & Employment
Faculty, UNM School of Public Administration
smeilleur@pomsassoc.com



1

TODAY'S PRESENTER



Steven G. Meilleur, Ph.D., SPHR
*Faculty, UNM School of Public Administration, and
Sr. Vice President, Risk Services – HR & Employment*
Poms & Associates Risk Services
201 3rd Street NW, Suite 1400 | Albuquerque, New Mexico 87102
(505) 933-6291 • (800) 578-8802 • smeilleur@pomsassoc.com

Steven G. Meilleur, Ph.D. is a Sr. Vice-President and Risk Services Consultant for Poms & Associates, specializing in human resources and employment matters. He has more than 40 years of experience in HR management, Risk Management, and Organizational Development in the public, private for-profit, and private non-profit sectors. Among other positions he has held, Dr. Meilleur has served as the HR Director for the City of Rio Rancho, NM.

His experience in HR management is in the public, private for-profit, and private non-profit sectors, having served in executive and other management positions. He received his BA in English Literature and Education at Bucknell University, and his EMBA & Ph.D. from the University of New Mexico. He is also a Lecturer on the faculty of the UNM Graduate School of Public Administration, teaching in the areas of human resource management, leadership, organizational behavior, strategy and change, and NPO management.



2

DISCLAIMERS

- *The information presented herein is prepared and provided by a human resources professional, and not by an attorney licensed to practice law in New Mexico, or in any other federal, state, or local jurisdiction.*
- *While this presentation provides information on federal, state and other law, it is not a substitute for legal advice. If you have concerns about this subject matter, consult with your legal counsel prior to acting on or relying upon the recommendations in this presentation.*
- *The information presented is intended as educational and is for general purposes only.*
- *Applicability of the information presented may vary by state or other local jurisdiction, by industry, and/or by employer.*




3



BASICS OF THE FMLA



4

INTRODUCTION TO THE FMLA

[§ 825.101](#)

- Purpose:
 - Balance work and family life
 - Promote economic security of families and serve national interest in preserving family integrity
- Shared Responsibilities:
 - Communication is key



5

EMPLOYER COVERAGE

[§ 825.104](#)

- Private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year – including joint employers and successors of covered employers.
- Public Agencies, including local, State, and Federal employers, regardless of the number of employees.
- Local education agencies, including private elementary and secondary schools, and charter schools, regardless of the number of employees.



6

EMPLOYEE ELIGIBILITY

[§ 825.110](#)

- Employed by covered employer
- Worked at least 12 months (*does not have to be consecutive*)
- Have at least 1,250 **hours of service** during the 12 months before leave begins
 - Paid leave and unpaid leave, including FMLA leave, are not included
 - Special hours of service rules apply to airline flight crew members.
- Employed at a work site with 50 employees within 75 miles



7

EMPLOYEE ELIGIBILITY – AIRLINE FLIGHT CREW EMPLOYEES

[§ 825.801](#)

- An airline flight crew employee meets the hours of service requirement if, during the previous 12-month period, he or she:
 - has worked or been paid for not less than 60 percent of the applicable monthly guarantee; and
 - has worked or been paid for not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave.



8

QUALIFYING LEAVE REASONS

[§ 825.112](#)

- Eligible employees may take FMLA leave:
 - For the birth or placement of a child for adoption or foster care
 - To care for a spouse, son, daughter, or parent with a serious health condition
 - For their own serious health condition
- **Military Family Leave**
 - Because of a qualifying reason arising out of the covered active duty status of a military member who is the employee's spouse, son, daughter, or parent (qualifying exigency leave)
 - To care for a covered service member with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the covered service member (military caregiver leave)



9

QUALIFYING FAMILY MEMBERS

[§ 825.122](#)

- **Parent** - A biological, adoptive, step or foster father or mother, or someone who stood *in loco parentis* to the employee when the employee was a son or daughter. Parent for FMLA purposes does not include in-laws.
- **Spouse** - A husband or wife as defined or recognized in the state where the employee was married and includes individuals in a same-sex marriage or common law marriage.
- **Son or Daughter** - *For leave other than military family leave*, 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 18 years of age, or 18 or older and incapable of self-care because of a mental or physical disability.



10

QUALIFYING LEAVE REASONS – FOR THE BIRTH OR PLACEMENT OF A CHILD

[§ 825.120-121](#)

- Both the mother and father are entitled to FMLA leave for the birth or placement of the child and/or to be with the healthy child after the birth or placement (bonding time)
- Employees may take FMLA leave before the actual birth, placement or adoption
- Leave must be completed by the end of the 12-month period beginning on the date of the birth or placement




11

QUALIFYING LEAVE REASONS – SERIOUS HEALTH CONDITION

[§ 825.113 - 114](#)

Illness, injury, impairment or physical or mental condition involving:

- Continuing Treatment by a Health Care Provider, or
- Inpatient Care
 - An overnight stay in a hospital, hospice, or residential medical facility
 - Includes any related incapacity or subsequent treatment




12

SERIOUS HEALTH CONDITION –
CONTINUING TREATMENT BY A HEALTH CARE PROVIDER
[§ 825.115](#)

Continuing Treatment by a Health Care Provider

- Incapacity Plus Treatment
- Pregnancy
- Chronic Conditions
- Permanent/Long-term Conditions
- Absence to Receive Multiple Treatments





13

SERIOUS HEALTH CONDITION –
CONTINUING TREATMENT BY A HEALTH CARE PROVIDER
[§ 825.115](#)

Incapacity Plus Treatment

- Incapacity of more than three consecutive, full calendar days that involves either:
 - Treatment two times by HCP (first in-person visit within seven days, both visits within 30 days of first day of incapacity)
 - Treatment one time by HCP (in-person visit within seven days of first day of incapacity), followed by a regimen of continuing treatment (e.g., prescription medication)



14

SERIOUS HEALTH CONDITION –
CONTINUING TREATMENT BY A HEALTH CARE PROVIDER
[§ 825.115](#)

Pregnancy

- Incapacity due to pregnancy or prenatal care

Chronic Conditions

- Any period of incapacity or treatment due to a chronic serious health condition, which is defined as a condition that:
 - requires periodic visits (twice per year) to a health care provider for treatment
 - continues over an extended period of time
 - may cause episodic rather than continuing periods of incapacity



15

SERIOUS HEALTH CONDITION –
CONTINUING TREATMENT BY A HEALTH CARE PROVIDER
[§ 825.115](#)

Permanent/Long-Term Conditions

- A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective

Absence to Receive Multiple Treatments

- For restorative surgery after an accident or other injury, or
- For conditions that, if left untreated, would likely result in incapacity of more than three consecutive, full calendar days



16

QUALIFYING EXIGENCY

- An eligible employee whose spouse, son, daughter, or parent has been notified of impending call to order to covered active military duty, or who is on covered active-duty status, may take FMLA for qualifying exigency.
- **Qualifying exigencies** may include leave related to the following situations:
 - Short-notice deployment
 - Military events and activities
 - Childcare and school activities
 - Financial and legal arrangements
 - Counseling
 - Rest and recuperation
 - Post-deployment activities
 - Additional activities arising out of active duty



17

MILITARY CAREGIVER LEAVE

- An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member or covered veteran may take up to 26 weeks of **military caregiver leave** in a 12-month period to care for:
 - A covered service member who is receiving medical treatment, recuperation or therapy, is in outpatient status, or on the temporary disability retired list for serious injury or illness;
 - A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness



18

AMOUNT OF LEAVE

[§ 825.200, 825.205 & 825.802](#)

- Employee's regular workweek is basis for entitlement
- Eligible employees may take up to **12 workweeks*** of FMLA leave:
 - for the birth or placement of a child for adoption or foster care;
 - to care for a spouse, son, daughter, or parent with a serious health condition; and
 - for the employee's own serious health condition.

* *Eligible airline flight crew employees are entitled to 72 days of FMLA leave*



19

AMOUNT OF LEAVE – INTERMITTENT LEAVE

[§ 825.202](#)

- Employee is entitled to take intermittent or reduced schedule leave for:
 - Employee's or qualifying family member's serious health condition when the leave is medically necessary
 - Covered service member's serious injury or illness when the leave is medically necessary
 - A qualifying exigency arising out of a military member's covered active-duty status
- Leave to bond with a child after the birth or placement must be taken as a continuous block of leave unless the employer agrees to allow intermittent or reduced schedule leave



20

AMOUNT OF LEAVE – INTERMITTENT LEAVE

[§ 825.205](#)

- In calculating the amount of leave, employer must use the shortest increment the employer uses to account for other types of leave, provided it is not greater than one hour *
- Shortest increment may vary during different times of day or shift
- Required overtime not worked may count against an employee's FMLA entitlement

** Special rules apply for calculating leave for airline flight crew employees*



21

AMOUNT OF LEAVE – SPECIAL RULES

[§ 825.204](#)

- Physical impossibility
- Holidays
- Planned medical treatment
- Transfer to an alternative position
- Spouses may be limited to a combined total for certain leave reasons



22

12-MONTH PERIOD

[§ 825.200](#)

Method determined by employer, but once the choice is made, you should stick with it, unless you have a sound business reason for making a change.

- Calendar year
- Any fixed 12-month leave year
- A 12-month period measured forward
- A rolling 12-month period measured backward



23

SUBSTITUTION OF PAID LEAVE

[§ 825.207](#)

- "Substitution" means paid leave provided by the employer runs concurrently with unpaid FMLA leave and normal terms and conditions of paid leave policy apply
- Employees may choose, or employers may require, the substitution of accrued paid leave for unpaid FMLA leave
- Employee remains entitled to unpaid FMLA if procedural requirements for employer's paid leave are not met



24

SUBSTITUTION OF PAID LEAVE – LIMITATIONS

[§ 825.207](#)

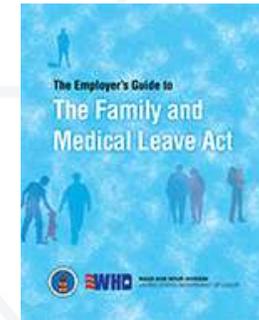
- Workers' compensation leave
 - may count against FMLA entitlement
 - “topping off” allowed if state law permits
- Disability leave
 - may count against FMLA entitlement
 - “topping off” allowed if state law permits
- Compensatory time off for non-exempt employees (*public sector only*)
 - may count against FMLA entitlement
 - subject to FLSA requirements



25

EMPLOYER RESPONSIBILITIES

- Provide notice
- Maintain group health insurance
- Restore the employee to same or equivalent job and benefits
- Maintain records



26

EMPLOYER RESPONSIBILITIES

1. PROVIDE GENERAL NOTICE - [§ 825.300](#)

- Employers must inform employees of FMLA:
 - Post a General Notice, and
 - Provide General Notice in employee handbook or, if no handbook, distribute to new employees upon hire
- Electronic posting and distribution permitted
- Languages other than English required where significant portion of workforce not literate in English
- CMP for willful posting violation



27

EMPLOYER RESPONSIBILITIES

2. PROVIDE NOTICE OF ELIGIBILITY - [§ 825.300](#)

- Within five business days of leave request (or knowledge that leave may be FMLA-qualifying)
- Eligibility determined on first instance of leave for qualifying reason in applicable 12-month leave year
- New notice for subsequent qualifying reason if eligibility status changes
- Provide a reason if employee is not eligible
- May be oral or in writing (optional WH-381)



28

EMPLOYER RESPONSIBILITIES
3. PROVIDE NOTICE OF RIGHTS AND RESPONSIBILITIES - § 825.300

- Provided when eligibility notice required
- Must be in writing (optional WH-381)
 - Recommend cover letter and the WH-381
- Notice must be translated in any situation where it is obligated to translate the general notice into a language in which employees are literate.
- The specific notice may include other information such as whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so.
- The notice of rights and responsibilities may be accompanied by any required certification form.



29

EMPLOYER RESPONSIBILITIES
3. PROVIDE NOTICE OF RIGHTS AND RESPONSIBILITIES - § 825.300

- Notice must include information on:
 - Leave may be designated and counted against the employee's annual FMLA leave entitlement if it qualifies as FMLA leave
 - The applicable 12-month period for the FMLA entitlement
 - Requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active-duty status, and the consequences of failing to do so
 - Employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave
 - Requirement for the employee to make any premium payments to maintain health benefits, the arrangements for making such payments, and the possible consequences of the failure to make such payments on a timely basis



30

EMPLOYER RESPONSIBILITIES
3. PROVIDE NOTICE OF RIGHTS AND RESPONSIBILITIES - § 825.300

- Notice must include information on:
 - Employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial
 - Employee's rights to maintenance of benefits during the FMLA leave and to restoration to the same or an equivalent job upon return from leave
 - Employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave




31

EMPLOYER RESPONSIBILITIES
4. PROVIDE NOTICE OF DESIGNATION - § 825.300

- Within five business days of having enough information to determine leave is FMLA-qualifying, absent any extenuating circumstances.
- Once for each FMLA-qualifying reason per applicable 12-month period (additional notice if any changes in notice information)
- Include designation determination; substitution of paid leave; fitness for duty requirements
- Must be in writing (optional WH-382)
- The employer must also notify the employee if it determines that the leave is not FMLA-qualifying and will not be designated as FMLA leave.
 - Such notice may be a simple written statement



32

EMPLOYER RESPONSIBILITIES

4. PROVIDE NOTICE OF DESIGNATION - § 825.301

- Employer must notify employee of the amount of leave counted against entitlement, if known; may be payroll notation
- If amount of leave is unknown (e.g., unforeseeable leave), employer must inform employee of amount of leave designated upon request (no more often than 30 days)
- Retroactive designation permitted provided that failure to timely designate does not cause harm to employee



33

EMPLOYER RESPONSIBILITIES

MAINTAIN GROUP HEALTH PLAN BENEFITS - § 825.209-213

- Group health plan benefits must be maintained throughout the leave period
- Same terms and conditions as if employee were continuously employed
- Employee must pay their share of the premium
- Even if employee chooses not to retain coverage during leave, employer obligated to restore same coverage upon reinstatement
- In some circumstances, employee may be required to repay the employer's share of the premium if the employee does not return to work after leave



34

EMPLOYER RESPONSIBILITIES

JOB RESTORATION - § 825.214- .219

- Same or equivalent job
 - equivalent pay
 - equivalent benefits
 - equivalent terms and conditions
- Employee has no greater right to reinstatement than had the employee continued to work
- Bonuses predicated on specified goal may be denied if goal not met
- Key employee exception



35

EMPLOYER RESPONSIBILITIES

Supervisor's Role

- It is critical that Supervisors be prepared to recognize potential FMLA qualifying situations.
- Keep in mind that for the employer's obligations under FMLA to apply, the employee does NOT need to specifically make a request "for FMLA leave."
- Once the employer (including any representative of management) is on notice regarding an employee's potentially qualifying need for leave, the employer must respond.
- Therefore, it is imperative that supervisors promptly notify HR upon learning of a potential need for FMLA protected leave, so that the employer can meet required response timelines.



36

EMPLOYER RESPONSIBILITIES

Supervisor's Role

After the supervisor's timely communication to HR:

- Within 5 business days of the employee providing notice, the employer must provide the Notice of Eligibility and Rights and Responsibilities.
- Employee notice to the supervisor of possible FMLA qualifying situation starts the clock ticking!



37

PROHIBITED EMPLOYMENT ACTIONS

[§ 825.220](#)

Employers cannot:

- interfere with, restrain or deny employees' FMLA rights
- discriminate or retaliate against an employee for having exercised FMLA rights
- discharge or in any other way discriminate against an employee because of involvement in any proceeding related to FMLA
- use the taking of FMLA leave as a negative factor in employment actions



38

EMPLOYER RESPONSIBILITIES

MAINTAIN RECORDS - [§ 825.500](#)

Employers must keep the records for no less than three years and make them available for inspection, copying, and transcription by Department of Labor representatives upon request. Records kept in computer form must be made available for transcription and copying.

- Basic payroll and identifying information (including name, address, and occupation)
- Rate or basis of pay
- Terms of compensation
- Daily and weekly hours worked per pay period
- Additions to or deductions from wages
- Total compensation paid



39

EMPLOYER RESPONSIBILITIES

MAINTAIN RECORDS - [§ 825.500](#)

In addition, covered employers who have eligible employees must also maintain records detailing:

- Dates of FMLA leave taken by FMLA eligible employees. Leave must be designated in records as FMLA leave and may not include leave required under state law or an employer plan which is not also covered by FMLA.
- Hours of FMLA leave taken by FMLA eligible employees, if leave is taken in increments of less than one full day
- Copies of employee notices of leave furnished to the employer
- Copies of all written notices given to employees as required under FMLA
- Documents describing employee benefits or employer paid and unpaid leave policies and practices
- Premium payments of employee benefits
- Records of disputes between the employer and the employee regarding FMLA



40

EMPLOYER RESPONSIBILITIES

MAINTAIN RECORDS - [§ 825.500](#)

- Records and documents relating to medical certifications, re-certifications or medical histories of employees or employees' family members, created for purposes of FMLA, are required to be maintained as confidential medical records in separate files/records from the usual personnel files.
- If the Americans with Disabilities Act (ADA) applies, then these records must comply with the ADA confidentiality requirements.
- Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations.
- First aid and safety personnel may be informed, where appropriate, if the employee's physical or medical condition might require emergency treatment.
- Government officials investigating compliance must be provided access to relevant information.



41

EMPLOYEE RESPONSIBILITIES

- Provide sufficient and timely notice of the need for leave
- If requested by the employer:
 - Provide certification to support the need for leave
 - Provide periodic status reports
 - Provide fitness-for-duty certification




42

EMPLOYEE RESPONSIBILITIES

NOTICE REQUIREMENTS - [§ 825.302 - .303](#)

- Provide sufficient information to make employer aware of need for FMLA-qualifying leave
- Specifically reference the qualifying reason or the need for FMLA leave for subsequent requests for same reason
- Consult with employer regarding scheduling of planned medical treatment
- Comply with employer's usual and customary procedural requirements for requesting leave absent unusual circumstances



43

EMPLOYEE RESPONSIBILITIES

NOTICE REQUIREMENTS - [§ 825.302 - .303](#)

- Timing of Employee notice of need for leave:
 - Foreseeable Leave - 30 days notice, or as soon as practicable
[§ 825.302](#)
 - Unforeseeable Leave - as soon as practicable
[§ 825.303](#)



44

EMPLOYEE RESPONSIBILITIES

PROVIDE CERTIFICATION - § 825.305

- Medical Certification for serious health condition (optional WH-380-E and 380-F)
 - Submit within fifteen calendar days
 - Employer must identify any deficiency in writing and provide seven days to cure
 - Annual certification may be required
 - Employee responsible for any cost
- **NOTE:** California employers should not use the "Certification of Health Care Provider" forms prepared by the U.S. Department of Labor without amendment. Employers with California operations should either:
 - remove any questions from medical certification forms that ask for medical facts, such as an employee's diagnosis or details about the regimen of continuing treatment; or
 - Use Fair Employment & Housing Council Certification of Health Care Provider form which can be found in the CFRA regulations.



45

EMPLOYEE RESPONSIBILITIES

PROVIDE CERTIFICATION - § 825.307

- Employer (**not** employee's direct supervisor) may contact health care provider to:
 - **Authenticate:** Verify that the information was completed and/or authorized by the health care provider; no additional information may be requested
 - **Clarify:** Understand handwriting or meaning of a response; no additional information may be requested beyond what is required by the certification form
- Second and third opinions (at employer's cost)
 - If employer questions the validity of the complete certification, the employer may require a second opinion
 - If the first and second opinions differ, employer may require a third opinion that is final and binding



46

EMPLOYEE RESPONSIBILITIES

PROVIDE CERTIFICATION - § 825.308, 313

- Recertification
 - No more often than every 30 days and with an absence
 - If the minimum duration on the certification is greater than 30 days, the employer must wait until the minimum duration expires
 - In all cases, may request every six months with an absence
 - More frequently than every 30 days if:
 - the employee requests an extension of leave, or
 - circumstances of the certification change **significantly**, or
 - employer receives information that casts doubt on the reason for leave
- Consequences of failing to provide certification
 - Employer may deny FMLA until certification is received



47

EMPLOYEE RESPONSIBILITIES

PROVIDE PERIODIC STATUS REPORTS - § 825.311

- The Family Medical Leave Act permits the employer to make periodic inquiries regarding any changes in the employee's FMLA status and their intent to return to work upon completion of FMLA leave.
- Employee must respond to employer's request for information about status and intent to return to work
 - Include this in cover letter at beginning of FMLA leave, with designation notice
 - Communicate prior to scheduled end of FMLA leave



48

EMPLOYEE RESPONSIBILITIES

FITNESS-FOR-DUTY CERTIFICATION - § 825.312

- For an employee's own serious health condition, employers may require certification that the employee is able to resume work
 - Employer must have a uniformly-applied policy or practice of requiring fitness-for-duty certification for all similarly-situated employees
- If state or local law or collective bargaining agreement is in place, it governs the return to work
- Not permitted for intermittent or reduced schedule leave unless reasonable safety concerns exist
- Authentication and clarification
- Employee responsible for any cost



49

OTHER ISSUES

- Exempt Salaried employees: § 825.206
 - Deductions from certain "exempt" employees' salaries
 - Deductions for employees paid overtime on a *fluctuating workweek method* (not legal in many states, including NM)
- Special rules for schools § 825.600-604
 - Special rules for taking leave on an intermittent or reduced schedule basis apply to school instructional employees. There are also special rules when a school instructional employee takes leave near the end of an academic term.
 - Leave taken by an instructional employee for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation, when the employee would not have been required to report for duty, is not counted against an employee's FMLA leave entitlement.



50

RESOURCES

- Forms and resources (<http://www.dol.gov/whd/fmla>)
 - Form WH-380-E - Certification of Health Care Provider for Employee's Serious Health Condition
 - WH-380-F - Certification of Health Care Provider for Family Member's Serious Health Condition
 - WH-381 - Notice of Eligibility and Rights & Responsibilities
 - WH-382 - Designation Notice
 - WH-384 - Certification of Qualifying Exigency For Military Family Leave
 - WH-385 - Certification for Serious Injury or Illness of Covered Service Member -- for Military Family Leave
 - FMLA Poster <http://www.dol.gov/whd/regs/compliance/posters/fmla.htm>
- DOL FMLA Factsheets https://www.dol.gov/whd/fmla/fact_sheets.htm



51

RESOURCES

- **Fact Sheet #28:** The Family and Medical Leave Act of 1993
- **Fact Sheet #28A:** Employee Protections under the Family and Medical Leave Act
- **Fact Sheet #28B:** FMLA leave for birth, bonding, or to care for a child with a serious health condition on the basis of an "in loco parentis" relationship
- **Fact Sheet #28C:** FMLA leave to care for a parent with a serious health condition on the basis of an "in loco parentis" relationship
- **Fact Sheet #28D:** Employer Notification Requirements under the Family and Medical Leave Act (FMLA)
- **Fact Sheet #28E:** Employee Notice Requirements under the Family and Medical Leave Act
- **Fact Sheet #28F:** Qualifying Reasons for Leave under the Family and Medical Leave Act
- **Fact Sheet #28G:** Certification of a Serious Health Condition under the Family and Medical Leave Act
- **Fact Sheet #28H:** 12-month period under the Family and Medical Leave Act (FMLA)
- **Fact Sheet #28I:** Calculation of Leave under the Family and Medical Leave Act
- **Fact Sheet #28J:** Special Rules for Airline Flight Crew Employees under the Family and Medical Leave Act
- **Fact Sheet #28K:** "Son or Daughter" 18 years of age or older under the Family and Medical Leave Act
- **Fact Sheet #28L:** Leave under the Family and Medical Leave Act for Spouses Working for the Same Employer
- **Fact Sheet #28M:** The Military Family Leave Provisions under the Family and Medical Leave Act
- **Fact Sheet #28M(a):** Military Caregiver Leave for a Current Service member under the Family and Medical Leave Act
- **Fact Sheet #28M(b):** Military Caregiver Leave for a Veteran under the Family and Medical Leave Act
- **Fact Sheet #28M(c):** Qualifying Exigency Leave under the Family and Medical Leave Act
- **Fact Sheet #28N:** Joint Employment and Primary and Secondary Employer Responsibilities Under the Family and Medical Leave Act (FMLA)
- **Fact Sheet #44:** Visits to Employers - Samoan
- **Fact Sheet #77B:** Protection for Individuals Under the Family and Medical Leave Act



52



TOP TEN FMLA ALLIGATORS



53

1 - NOT HAVING, OR COMMUNICATING YOUR FMLA POLICY, OR PROCEDURES



- **Is Your FMLA Policy Current and Up-To-Date?**
 - In any audit or review, the DOL will review an employer’s FMLA policy and all of its FMLA forms to ensure that the FMLA regulations are incorporated in these documents.
 - Is your FMLA policy included in your employment policy manual, along with the contents of the FMLA poster (or the poster itself)?
 - Does your policy incorporate issues such as:
 - FMLA eligibility.
 - How the 12-week leave period is calculated.
 - Notice requirements for workers requesting leave.
 - Medical certification rules documenting the need for time off.
 - Steps employees must take to report to the company while on leave.
 - Eligibility for benefits while employees are out.
 - Fitness-for-duty certification requirements.
 - What happens if the employee can’t return to work when leave is up.



54

1 - NOT HAVING, OR COMMUNICATING YOUR FMLA POLICY, OR PROCEDURES



- **Have You Properly Communicated Your FMLA Policy and Procedure to Employees?**
 - Employers are required to notify employees of their FMLA leave rights in two separate ways.
 1. Employers must post FMLA rights for employees. This can happen electronically in an employee self-service portal or it can be physically posted at the employer’s business location in a commonly used area.
 2. Employers must notify new employees of FMLA rights upon hire. The notice can be included in an employee handbook, on a form, or it can also be provided in an electronic format.
 - According to the ruling in Carl L. Thom Jr. vs. American Standard Inc. the court suggests that employers must also communicate the procedure by which leave needs to be taken and how you are tracking employees’ time (i.e. rolling calendar year measured forward/measured backward etc.).



55

1 - NOT HAVING, OR COMMUNICATING YOUR FMLA POLICY, OR PROCEDURES



- **Do you have a clear, written set of FMLA administrative procedures and guidelines?**
 - Create FMLA administration procedures – and apply them consistently. All company practices around FMLA management – from understanding the laws to the documentation required for record-keeping to employee communication – should be clear to the team that’s handling leave requests.
 - One of the biggest mistakes companies make is different people within the company handling and / or interpreting FMLA differently. Ongoing training and having specific procedures in place for how your company will manage FMLA can help alleviate these issues.
 - Best practice is to have FMLA administered through HR, or another neutral third party administrator.



56

1 - NOT HAVING, OR COMMUNICATING YOUR FMLA POLICY, OR PROCEDURES

- **Are you adhering to employer posting requirements?**
 - In addition to posting your FMLA policy in your handbook, employers also must post the DOL's FMLA poster "prominently" where it can be viewed by employees and applicants.
 - If a substantial portion of your workplace speaks a language other than English, you must provide the poster in that language.
- **Are your FMLA forms current, and legally compliant?**
 - Examine all existing FMLA forms to determine whether they comply with FMLA regulations.
 - A technical violation of the FMLA can be costly, so employers should ensure that their FMLA forms (Notice of Eligibility and R&R Notice, certification forms, Designation Notice) are all up to snuff.



57

1 - NOT HAVING, OR COMMUNICATING YOUR FMLA POLICY, OR PROCEDURES

- **Is your FMLA correspondence legally compliant?**
 - In addition to the forms above, be sure to put in place and review legally compliant correspondence regarding certification, recertification, failure to provide certification, insufficient/incomplete certification, employee's return to work, second/third opinions. These communications also will be reviewed by the DOL during an investigation.
- **Conduct a comprehensive audit of your FMLA policy, practices, and procedures.**
 - If necessary, pull in an FMLA expert or your in-house or outside employment counsel on this self-audit.
- **Self-Audit and review your FMLA & other leave policies and administrative procedures at least once a year.**



58

2 - SILENT AND/OR UNTRAINED MANAGERS AND SUPERVISORS

- Some managers are not trained well enough about FMLA to recognize an FMLA leave or to understand the protection that employees gain from the law.
 - Courts have consistently ruled that if an employee provides enough information to the employer for the employer to know that the leave should have been FMLA covered, that the employer must abide by FMLA law.
 - If an employee mentions a serious health condition and a manager doesn't recognize the leave as FMLA qualified, the employer might be found out of compliance.
- Managers sometimes fail to tell HR right away when an employee is out on leave for an extended period.
 - If a manager waits to inform HR, that could delay the start of the 12-week FMLA period, and you can't make the FMLA leave retroactive,



59

2 - SILENT AND/OR UNTRAINED MANAGERS AND SUPERVISORS

- Employees may be given repercussions for taking FMLA leave because supervisors don't realize that FMLA time is protected or that certain absences are covered under FMLA.
 - Untrained front-line supervisors might retaliate against employees who take FMLA leave, dissuade workers from taking leave or request prohibited medical information, all of which violate the FMLA and perhaps other laws.
 - Employers who retaliate against an employee for absences that should be counted as FMLA absences will be found non-compliant and will be liable for all penalties and fines.
- Supervisors and Managers should be trained on what could constitute an employee's notice of the need for FMLA leave, and to promptly follow up with Human Resources,

Yes, managers can be held personally liable for FMLA violations.



60

3 - MISSED OR LATE NOTICES

- Employers sometimes fail to provide required notices to employees under the FMLA, which requires employers to provide four notices to employees seeking FMLA leave.
 - Employers must give a general notice of FMLA rights.
 - They must provide an eligibility notice within five days of the leave request.
 - They must supply a rights and responsibilities notice at the same time as the eligibility notice.
 - And employers must give a designation notice within five business days of determining that leave qualifies as FMLA leave.
- Workers frequently ask to extend their leave; sometimes you can request recertification, but there are limits, especially if you're dealing with intermittent leave.
- When an employee's leave is ending, you can require a fitness-for-duty exam if you told them you'd need this at the designation stage. But as with everything else, there are other limits such as it needs to be relevant to their leave and job.



61

3 - MISSED OR LATE NOTICES

- Providing Notice Prior to End of Leave is a best practice.
- Whether or not you're going to require a fitness-for-duty exam, you should send employees a notice that says their leave is wrapping up, that you're super excited to see them again, and that if they need anything, to please let you know.
 - This sets them up to request a workplace accommodation, including a leave extension.
 - Remember, if you know or should know that someone needs a disability accommodation, the employer can be held liable for failing to offer it. Like the FMLA, workers don't even need to know the ADA exists to be protected by it.




62

3 - MISSED OR LATE NOTICES

FMLA NOTICE CHECKLIST:

- You post WH-1420 and provide individual notices.
- Employee puts you on notice of need for leave.
- Within five days, you provide WH-381 and, if desired, the relevant certification form (WH-380-E, WH-380-F, WH-384, WH-385 or WH-385V).
- Within 15 days (assuming there are no extenuating circumstances), the employee returns the relevant certification form.
- If incomplete/insufficient, you explain what's missing.
- Within seven days (under most circumstances), employee submits complete/sufficient certification.
- Within five days, you provide WH-382 and, if desired, a fitness-for-duty notice.
- When the leave nears its end, you get in touch about the fitness-for-duty exam and, as a best practice, provide a notice that the leave is coming to an end and an invitation to contact you if assistance is needed.



63

4 - INCOMPLETE MEDICAL CERTIFICATIONS AND MISSING JOB DESCRIPTIONS

- Employers should attach the employee's job description to the designation notice. This allows the health care provider to understand what the employee's duties are and to accurately release the employee for work.
 - If the employee's job description or duties aren't attached to the designation notice, then the health care provider may rely on the employee to describe their work and may mistakenly release them for work when they are not ready.
- In addition, some employers mistakenly believe that only a medical doctor can provide a fitness for duty certification. In fact, any healthcare provider can release an employee for work. This includes clinical psychologists, nurse practitioners, physician assistants, and even chiropractors in some situations.



64

4 - INCOMPLETE MEDICAL CERTIFICATIONS AND MISSING JOB DESCRIPTIONS



- If the certification is incomplete or insufficient, the employer must give the employee a written notice stating what additional information is necessary to make the certification complete and sufficient. The employee must provide the additional information to the employer within seven calendar days, in most circumstances.
 - A certification is considered “incomplete” if one or more of the applicable entries on the form have not been completed.
 - A certification is considered “insufficient” if the information provided is vague, unclear, or non-responsive.
- Once the employer has received a complete and sufficient certification, the employer may not request additional information from the health care provider.



65

4 - INCOMPLETE MEDICAL CERTIFICATIONS AND MISSING JOB DESCRIPTIONS



- However, the employer may use a human resources professional, a leave administrator, another health care provider, or a management official to contact the health care provider to authenticate or to clarify the certification.
 - It is best to get this information through the employee.
 - **authentication** means providing the health care provider with a copy of the certification and requesting verification that the information contained on the form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested.
 - **Clarification** means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form.



66

5 - NOT HANDLING BENEFITS PROPERLY WHILE EMPLOYEES ARE ON FMLA LEAVE



- Employers must maintain employee healthcare coverage while employees are on FMLA leave. However, they may require employees to cover their share of premiums.
- If employees must make health care contributions, but doesn't then after returning to work, coverage must be provided without any waiting periods.
- For other types of benefits, employers must follow their usual policies for employees on leave regarding whether other benefits continue or accrue during leave, or not.
- Employees are entitled to restoration of benefits they had previously qualified for when they return from FMLA leave, with no waiting period or requalification requirement; such as seniority, perfect attendance, or other benefits.



67

5 - NOT HANDLING BENEFITS PROPERLY WHILE EMPLOYEES ARE ON FMLA LEAVE



- Even if an employer doesn't usually continue, for example, life insurance while employees are on unpaid leave, it might have to continue that benefit for an employee on FMLA leave, if a gap in coverage would require the employee to requalify for insurance. An employer who has to continue an employee's benefits for this reason can recover the employee's share of the premium from the employee after he or she returns to work.
- FMLA leave does not have to be counted as hours worked or “time in service” for purposes of vesting, benefit accrual, or eligibility.
- However, 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, an employee who is on FMLA leave is considered to be “employed” during that time.



68

5 - NOT HANDLING BENEFITS PROPERLY WHILE EMPLOYEES ARE ON FMLA LEAVE



- **Arranging Payment for Benefits** - In many cases, if the employee chooses to use any available paid personal leave or vacation during the typically unpaid FMLA, deductions can be taken from their paid time off “bank” as the premiums are paid during the leave.
- However, if the employee does not have or use available paid leave, you and the employee should work out arrangements for the payment of the employee’s usual portion of the insurance premiums in order to maintain insurance coverage.



69

5 - NOT HANDLING BENEFITS PROPERLY WHILE EMPLOYEES ARE ON FMLA LEAVE



- You can make arrangements to pay the employee’s share of insurance premiums in a number of ways:
 - The employee can agree to make a single payment for their entire share of premiums required for the duration of their leave.
 - The employee can write you a check each pay period during the leave to cover their share of the premium.
 - You can negotiate a payment plan that works for both you and the employee; whatever you mutually agree to is fine.
 - You may choose to pay the employee’s portion of the premium, and you may require the employee to repay you upon returning to work.
- The agreement should be in writing and signed by both parties. It should also include information concerning recovery of premiums paid by the employer that the employee must repay.



70

5 - NOT HANDLING BENEFITS PROPERLY WHILE EMPLOYEES ARE ON FMLA LEAVE



- It is important to remember that you must provide written notice to the employee that the payment has not been received and allow at least 15 days after the date of the letter before coverage stops.
- This is obviously a very serious consequence, so be sure to alert your employee to this eventuality early in the process of them taking FMLA leave.
- Finally, if FMLA leave is unpaid, as is typical, if an employee chooses not to return to work or fails to work for 30 days after their FMLA leave, employers may require the employee repay the employer’s share of premium payments made on behalf of the employee during their leave.



71

5 - NOT HANDLING BENEFITS PROPERLY WHILE EMPLOYEES ARE ON FMLA LEAVE



- There are limitations to this right of recovery and caution should be exercised when considering taking this action.
 - The employer’s share of premiums cannot be recovered from the employee if the employee’s illness or injury prevented their return to work or if they had to continue to provide care for a family member.
 - There can be no recovery of the employer’s share if the employee was unable to return to work for reasons “beyond the employee’s control.”
- The best way to approach any payment arrangement during FMLA leave is through clear and detailed discussions with the employee so they fully understand their rights and obligations, as well as yours as their employer.
- In general, all discussions with the employee on all aspects of the FMLA process should be documented and shared with the employee to ensure everyone is on the same page.



72

6 - TAKING IMPROPER ADVERSE ACTION AGAINST EMPLOYEES ON FMLA



- Taking any adverse employment actions, such as demotion, termination, failing to promote, benefit reduction, etc., against employees upon their return from FMLA leave is retaliation, and is the number one cause of all FMLA complaints with the EEOC.
- Denying a request for FMLA leave and then taking adverse action against the employee can also be seen as retaliation.
- The FMLA explicitly prohibits employers from taking official, adverse employment actions against an employee (for example, counting the employee's FMLA leave under a no-fault attendance policy) in retaliation for taking or requesting FMLA leave.



73

6 - TAKING IMPROPER ADVERSE ACTION AGAINST EMPLOYEES ON FMLA



- While adverse action may have already been in the works and may be completely justified, the timing of the justified and reasonable adverse action should be taken into consideration prior to any adverse employment action.
- When taking adverse action against an employee out on FMLA leave, employers must demonstrate that the terminated or disciplined employee would have been discharged or disciplined even if the employee had not taken or requested his or her protected leave.
- The employer must demonstrate a legitimate, nondiscriminatory business reason for terminating or disciplining the employee that is unrelated to FMLA leave.



74

6 - TAKING IMPROPER ADVERSE ACTION AGAINST EMPLOYEES ON FMLA



- Employers must be mindful of the timing of adverse action taken. An employee discharged during FMLA leave will have a stronger argument for retaliation than an employee who returned from leave six months prior to his or her discharge.
- Recordkeeping and documentation is key. An employer that decides to terminate an employee who requested FMLA leave for poor performance can readily defend its decision with a well-documented personnel file detailing the employee's poor performance and prior corrective or disciplinary actions.
- If faced with terminating an employee who is out on FMLA leave due to performance issues, a company-wide reduction in force (RIF) or perhaps even due to FMLA leave abuse or fraud, the employer should be careful to properly notify the employee of the termination of his or her employment and to do so in a timely manner.



75

6 - TAKING IMPROPER ADVERSE ACTION AGAINST EMPLOYEES ON FMLA



- The U.S. Court of Appeals Tenth Circuit highlighted five cases in which it threw out a worker's FMLA lawsuit after finding *"undisputed evidence that the employee in question would have been terminated even if FMLA leave had not been taken."*
- If you can prove one of these elements exist when weighing your decision to terminate an employee on FMLA leave, it's generally safe to say "you're fired":
 1. employee failed to comply with a direct and legitimate order from supervisors
 2. there was overwhelming evidence of performance issues that predated the leave
 3. employee had repeatedly been tardy and was non-compliant with absence policy on the date she was terminated
 4. employee, prior to leave, had been tardy, absent from her desk, failed to timely pay invoices or update list of services received from vendors, and
 5. evidence was unequivocal that the reduction-in-force decision had already been made before the employee took FMLA leave.



76

7 - FAILING TO TAKE AND KEEP PROPER RECORDS OF FMLA LEAVE



- FMLA recordkeeping requirements can be found in a single regulation, 29 C.F.R. § 825.500.
 - That regulation requires employers to keep and preserve records in accordance with the recordkeeping requirements of the Fair Labor Standards Act (FLSA).
 - Records must be retained for no less than three years.
 - Although no particular order or form is required, the records must be capable of being reviewed or copied.
- Records and documents relating to medical certifications, re-certifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records separately from the usual personnel files.



77

7 - FAILING TO TAKE AND KEEP PROPER RECORDS OF FMLA LEAVE



- **Document everything.** Every interaction, including every phone call with the employee while out on leave, should be documented, whether it is voice recorded or entered into a secure centralized database.
 - Policy information and questions and answers around those policies should be available to both employer and employee via email.
 - Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific written notices given to employees are required under FMLA regulations. The required copies may be maintained in employee personnel files.
 - Documents (defined to include written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves must also be maintained, along with records of premium payments, if any, of employee benefits.



78

8- NOT DEALING CORRECTLY WITH INTERMITTENT OR REDUCED LEAVE



- FMLA leave allows for **intermittent FMLA leave** in hourly or daily increments for a serious health condition of the employee or their family member.
 - Employers must track FMLA leave using the smallest increment of time used for other forms of leave subject to a 1-hour maximum.
- A "**reduced leave schedule**" is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. Reduced leave schedule is a change in the employee's schedule for a period of time, normally from full time to part time.
 - An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.



79

8- NOT DEALING CORRECTLY WITH INTERMITTENT OR REDUCED LEAVE



- The employer should use a timekeeping system that has the capacity to track intermittent leave in the minimum increment and tag and tabulate such leave as FMLA/intermittent.
- The USDOL medical certification forms enable the employer to specifically ask the employee's healthcare provider about:
 - Intermittent/reduced schedule leave for planned treatment, and why there is medical necessity for leave and estimate of dates and duration of treatment/recovery periods;
 - Likelihood of unforeseeable episodes of incapacity, why there is medical necessity for leave, and estimate of frequency and duration of episodes of incapacity; and
 - Continuing treatment, the schedule of such treatment, whether episodic flare-ups are anticipated, the frequency of those flare-ups, and whether the employee will be absent from work during those flare-ups.



80

9 - FAILING TO TAKE ADAAA ACCOMMODATIONS INTO ACCOUNT



- A serious health condition that requires 12 weeks of FMLA leave will likely also constitute a disability under the Americans with Disabilities Act (ADA),
- Even after 12 weeks of FMLA leave, more leave may be required by the ADA or state or local law as a reasonable accommodation.
- Under ADA, an extension of unpaid leave could be a reasonable accommodation in some circumstances. Oftentimes, both FMLA and ADA apply, especially when serious health conditions are present.
- Document any adverse effects on productivity, ability to timely meet client demands and extra workload on co-workers resulting from an employee on extended FMLA leave.
 - Needed for analysis as to whether an ADA accommodation is reasonable or is an undue hardship" under the ADA.



81

9 - FAILING TO TAKE ADAAA ACCOMMODATIONS INTO ACCOUNT



- When an employee is about to exhaust FMLA leave, employers should consider communicating with the employee regarding the leave and return-to-work status.
- Consider the interaction between the FMLA and ADA, and explore whether additional leave can be provided as a reasonable accommodation under the ADA.
- **NOTE:** If an employee is on FMLA leave for a serious medical condition and gets a partial release to work with limitations or restrictions, consider the employee as being presumptively disabled under the ADA, triggering the "interactive process."
 - Courts have consistently ruled that employers must consider offering additional leave as a "reasonable accommodation" for disabled employees after they exhaust their FMLA allotment.



82

10 - NOT UNDERSTANDING HOW HOLIDAYS AND BREAKS PLAY INTO FMLA LEAVE



- Under the FMLA regulations, determining the amount of leave used by an employee is treated differently based on whether the employee is on continuous or intermittent FMLA leave:
 - **Continuous FMLA leave.** If an employee is on continuous FMLA leave, the fact that a company holiday may occur within the week taken as FMLA leave has no effect. The entire week of leave is counted as FMLA leave.
 - **Intermittent FMLA leave.** If an employee is on intermittent FMLA leave and using increments of less than one week, the holiday will not count against the employee's FMLA leave, unless the employee was scheduled and expected to work the holiday and takes the day off as FMLA leave.
- Holiday pay must be consistent with other forms of non-FMLA paid or unpaid leave. Holiday pay if employee is on vacation?



83

10 - NOT UNDERSTANDING HOW HOLIDAYS AND BREAKS PLAY INTO FMLA LEAVE



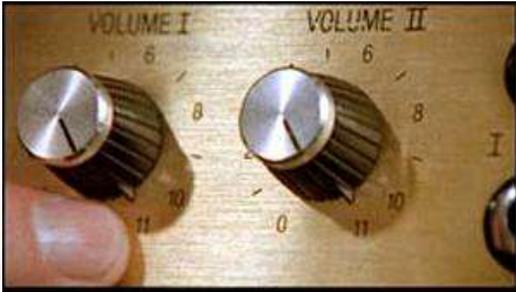
- In situations where the employer shuts down operations for a period of time, or a School District observes winter and summer breaks, the regulations say:
 - *"If for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement."*
- If there is a weeklong shutdown over the holidays, like a plant closing or school shutdown, and employees are not expected to work, 29 C.F.R. § 825.200(h) provides that the shutdown period does not count against the employee's FMLA entitlement. A partial week shutdown is treated in the same manner as if the days off work were holidays.



84

BUT THIS ISN'T ANY OLD TOP 10 LIST ...

- *This one goes to ...*



With a tip of the cap to




85

**11 – THE HR BERMUDA TRIANGLE:
FMLA > ADA > WC - WHEN THEY OVERLAP**

WORKERS' COMPENSATION + ADA

- If an employee is injured in a work-related accident, they may be entitled to benefits provided under workers' compensation.
- If that employee develops a disability that limits a major life activity as a result of that injury, he or she might also then be protected by the ADA.
- If this is the case, the employer should make sure to go through the interactive process with the employee to determine what/if any reasonable accommodations might need to be made.

FMLA + ADA

- If an employee sustains an injury or develops a serious health condition that is unrelated to work, he or she might be entitled to take up to 12 workweeks of job-protected leave to care for themselves under FMLA.
- If that condition also limits a major life activity, he or she may also be protected by the ADA.

WC + FMLA + ADA

- If an employee sustains a work-related injury that substantially limits one or more major life activities and needs to take leave to care for themselves, he or she might be protected by all 3 laws.



86

**11 – THE HR BERMUDA TRIANGLE:
FMLA > ADA > WC - WHEN THEY OVERLAP**

TRANSITIONAL WORK, RESTRICTED OR LIMITED DUTY

- **ADAAA** – Required to be offered, if it is a reasonable accommodation that does not create an undue hardship on the employer.
- **FMLA** – Transitional work can be offered but cannot be “required”.
- **Workers' Compensation** – Ought to be offered if available as it may eliminate the employee's entitlement to the wage replacement benefit.




87

**11 – THE HR BERMUDA TRIANGLE:
FMLA > ADA > WC - WHEN THEY OVERLAP**

FITNESS-TO-RETURN-TO-WORK CERTIFICATION

- *Should have an employment policy and should also include requirement for R-T-W certification in the Letter of Designation for Leave.*
- *Make sure the Return-to-Work Certification focuses on limitations and restrictions, so you can determine whether accommodations will be needed under the ADAAA*
- **ADAAA** – Permitted as long as the medical examination and inquiry is job-related and necessary to determine whether the employee can perform the essential functions of the job.
- **FMLA** – Can only be required under a policy or practice that requires employees who have been on a similar type of leave of absence
- **Workers' Compensation** – May be and is typically required.



88

11 – THE HR BERMUDA TRIANGLE: FMLA > ADA > WC - WHEN THEY OVERLAP

REQUIREMENT TO R-T-W WITHOUT RESTRICTIONS

- Many employers have a policy that requires employees who are injured on-the-job to return to work with a full release, without restrictions.
- **IF YOU HAVE THIS POLICY, LOSE IT IMMEDIATELY!!!**
- By refusing to allow an employee to return to work with restrictions, you have failed to follow the ADA. You must:
 - Evaluate the substance of those restrictions;
 - Evaluate the duration of those restrictions;
 - Evaluate the nature of the employee's individual job; and
 - Discuss those limitations with the employee by using the ADA "Interactive Process."




89

BUT THIS ISN'T ANY OLD TOP 11 LIST ...

- *This one goes to ...*





90

12 – NOT RECOGNIZING FMLA'S INTERACTION WITH OTHER STATE & FEDERAL LAWS

- The FMLA regulations and guidance offered by the Department of Labor (DOL) provide fairly specific rules to follow in the administration of FMLA leave.
- BUT, they do not cover all of the other, and often concurrent, Federal and State employment-related obligations that employers may have.
- Most commonly, this intersection of rights has been referred to in publications and presentations as "The Bermuda Triangle of HR & Employment Law" - includes the FMLA, the ADA and workers' compensation laws.
- Importantly, however, the overlaps are far more extensive than the "Bermuda Triangle."




91

12 – NOT RECOGNIZING FMLA'S INTERACTION WITH OTHER STATE & FEDERAL LAWS

- FMLA can intersect with several federal, state and local antidiscrimination laws, state and local leave laws, workers' compensation statutes, collective bargaining agreements (CBAs) and employer-created policies.
 - Various legal requirements may come into play prior to, during or following an employee's FMLA leave.
- When an employee requests FMLA leave, the employer should review the employee's request to determine if the employee is entitled to rights under any other law, CBA or employer-created policy and then apply the right(s) that are most beneficial to the employee.
- Not understanding these interactions can cost you significant costs in work days lost, and possible legal liability exposure.




92

12 – NOT RECOGNIZING FMLA’s INTERACTION WITH OTHER STATE & FEDERAL LAWS



- Employers can unintentionally overlook state FMLA leave laws, particularly if an employer has remote workers or small numbers of employees across multiple state jurisdictions.
- These laws vary, some adding additional family members to the definition of a covered family member, some setting lower employee thresholds for leave eligibility, some providing for only additional family leave rights, and some mirroring the federal FMLA more closely but providing leave over a longer period of time.
- In jurisdictions with state FMLA leave laws, employers should consider comparing the state law with the federal FMLA to determine any additional rights to which employees may be entitled. These laws also typically have their own notice requirements. In some states, a state-specific policy may be appropriate, or required.



93

12 – NOT RECOGNIZING FMLA’s INTERACTION WITH OTHER STATE & FEDERAL LAWS



- The list below is a brief introduction to the FMLA's interplay with state and federal law and illustrates many of the issues that may arise under various employment laws and obligations when employees seek, take and return from FMLA-type leaves.

• The Americans with Disabilities Act	• COBRA
• The Fair Labor Standards Act	• Health Insurance Portability and Accountability Act (HIPAA)
• Workers’ Compensation Laws	• Short-Term Disability Plans
• Pregnancy Discrimination Act	• Long-Term Disability Plans
• The Genetic Nondiscrimination Act	• Collective Bargaining Agreements
• Uniformed Services Employment and Re-Employment Act	• Employment Policy Manual
• ERISA	• Other State Laws



94



FMLA FAQs – FOR REFERENCE



95

FAQ #1 - An employee needs follow-up treatments after surgery and asks to take intermittent FMLA every other Friday afternoon. Do we have to let her leave early?

- **For the most part, yes – but you have options:**
 - After you get her medical certification, you can ask for a second opinion to make sure she really needs leave. Then, ask if there’s any reason she needs to get treated on Fridays — and have her give you verification from her doctor.
 - Don’t forget – the second medical opinion must be paid for by the employer, and the time for the employee to get the second medical opinion is compensable time
 - If there’s no medical reason to take leave at those times, you’re allowed to ask her to schedule the treatments after work or on other days.



96

FAQ #2 - We have an employee on intermittent FMLA. At first, his absences were sporadic, but now he takes off frequently, always on Monday and Friday. What can we do?

- **Get a medical recertification:**
 - Employers are allowed to ask employees on intermittent FMLA to get certified:
 - Every 30 days, or
 - at any time if circumstances change, or
 - If the company has reason to think something fishy is going on.
 - According to a Department of Labor Opinion Letter, a pattern of Monday/Friday absences (*or other documented "pattern absence"*) is enough to warrant recertification.



97

FAQ #3 - To curb abuse, we have managers or an HR rep call employees on leave to make sure they aren't trying to use FMLA as a substitute for vacation time. Can we do that?

- **Yes, you can.**
 - That can be an effective way to prevent abuse, and courts have found policies like that to be reasonable.
 - Best practice is to communicate in a cover letter along with the Designation Notice, that:
 - Employees must follow the employer's call-in policy for SL; and
 - The employer will be in contact with the employee on FMLA leave on a regular, periodic basis.
 - In fact, some companies have even gone as far as hiring a private investigator to watch an employee suspected of FMLA abuse and were able to win in court.



98

FAQ #4 - One of our employees has a serious medical condition and qualifies for FMLA. We offered him leave, but he refuses to take it. What do we do now?

- According to the United States Department of Labor, employers **can** designate employees' absences as covered under the Family Leave Act (FMLA) even if the employee doesn't want to use FMLA time. Employees do not have the right to decline FMLA leave when they are out for an FMLA-qualifying reason.
 - For example, an FMLA-eligible employee who is pregnant has to have knee surgery that will keep her out of work for 3 weeks. The knee surgery is an FMLA-qualifying event, but the employee wants to use vacation time for the surgery instead of FMLA because she wants to take the full 12 weeks of FMLA when her child is born later that year. What is an employer to do? According to the DOL, an employer can require the employee to use FMLA leave.
- The DOL, in opinion letter FMLA 2019-1-A, makes it clear that it's the employer's duty to designate all FMLA-qualifying leave as such and may not delay the designation of the leave as FMLA. What that means is that if a leave is an FMLA leave, it's an FMLA leave—regardless of whether the employee wants FMLA or not.
- Still, in 2014 the 9th Circuit (Alaska, Arizona, California and Hawaii) held that an employee can decline FMLA leave and use other paid leave even if the underlying reason for the leave is an FMLA reason.
- **So, it depends on your jurisdiction and your risk tolerance.**
 - Most employers should feel comfortable relying on the DOL's opinion letter. However, bear in mind, it doesn't mean a court has to agree.



99

FAQ #5 - What happens if an employee comes back from leave and can't perform his job because of his medical condition?

- **There are a few questions you need to answer here.**
 - Is he ADA-protected? Some conditions that qualify for FMLA leave are also protected by the ADA. If so, you may need to accommodate the employee's disability.
 - Can he perform the job's essential functions? In a recent decision, a court ruled the company couldn't deny reinstatement based on an inability to perform nonessential job functions (*Carstetter v. Adams County Transit Authority*).
 - **BUT** as the law states, if he's not protected by the ADA and can't perform an essential job function, you have no obligation to reinstate him to the same position.
 - Best practice would be to consider him for other positions.



100

FAQ #6 - Can an employer change an employee's job when the employee takes intermittent or reduced schedule leave?

- **For the most part, yes:**
 - Employees needing intermittent/reduced schedule leave for foreseeable medical treatments must work with their employers to schedule the leave so as not disrupt the employer's operations, subject to the approval of the employee's health care provider.
 - In such cases, the employer may transfer the employee temporarily to an alternative job with equivalent pay and benefits that accommodate recurring periods of leave better than the employee's regular job.



101

FAQ #7 - Can an employer contact the employee's health care provider about the employee's serious health condition?

- **Contact between an employer and an employee's health care provider must comply with HIPAA privacy regulations.**
 - Employers may contact an employee's health care provider **through the employee** for authentication or clarification of the medical certification by using a health care provider, a human resource professional, a leave administrator, or a management official.
 - Recommended that you use a cover letter providing background information about what you know or are observing, or what the employee has disclosed.
 - In no case may the employee's direct supervisor contact the employee's health care provider.
 - For a health care provider to provide an employer with individually-identifiable health information, the employee will need to provide the health care provider with a written authorization allowing the health care provider to disclose such information to the employer.
 - Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.



102

FAQ #8 - Can you require an employee to sign a medical release as a part of a medical certification?

- **NO.**
 - An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion.
 - Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification.
 - If an employee does not provide either a complete and sufficient certification or an authorization allowing the health care provider to provide a complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.



103

FAQ #9 - Can employers require employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?

- **YES:**
 - As a condition of restoring an employee who was absent on FMLA leave due to a serious health condition, an employer may have a uniformly applied policy or practice that requires **all similarly situated employees** who take leave for such conditions to submit a certification from the employee's own health care provider that the employee is able to resume work.
 - An employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position **if the employer has appropriately notified the employee that this information will be required and has provided a list of essential functions.**
 - 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.



104

FAQ #10 - What happens if the employee does not submit a requested medical or fitness-for-duty certification?

- If an employee fails to timely submit a properly requested medical certification (absent sufficient explanation of the delay), FMLA protection for the leave may be delayed or denied. If the employee never provides a medical certification, then the leave is not FMLA leave.
- If an employee fails to submit a properly requested fitness-for-duty certification, the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.
- It is not necessary to obtain medical certification in order to designate an absence as FMLA leave. *See 29 C.F.R. 825.300(d)(2)*
 - *“If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee’s need for leave, the employer may provide the employee with the designation notice at that time.”*



105

FAQ #11 - Can an employee decline FMLA leave when an eligible employee is absent for an FMLA-qualifying reason?

- Neither an employee nor an employer may decline FMLA leave where an eligible employee is absent for an FMLA-qualifying reason. As the DOL noted in a March 2019 opinion letter, this is particularly true even where the employee would prefer that the employer delay the designation of FMLA leave.
- Once the employer has enough information to determine that an employee’s leave is covered by the FMLA, it must designate the leave as FMLA leave even where a collective bargaining agreement states otherwise.
- Employers can provide for more generous leave policies, but those policies still must comply with the FMLA. And as we see here, additional paid or unpaid leave must follow FMLA leave. .



106

FAQ #12 - Does parent attendance at school IEP meeting qualify as an FMLA-covered absence?

- **YES** – definitely yes.
- In an opinion letter issued 8/9/2019, the DOL found that the FMLA covers an employee’s attendance at a school meeting where their child’s individualized education program (IEP) will be discussed.
 - The request for an opinion letter came from a set of parents whose two children have serious health conditions. The employer for one of the parents approved intermittent FMLA leave to transport their children to and from medical appointments but refused a request to take intermittent FMLA leave to attend school meetings.
 - Based on these facts, the DOL determined that the employee’s attendance at the IEP meetings constitutes “care for a family member ... with a serious health condition.”
 - Employers should treat a request for FMLA leave to attend an IEP meeting consistent with how they handle other intermittent FMLA leave requests. The employee is required to provide notice for a foreseeable leave of absence and provide appropriate certification.



107

FAQ #13 – Can the employer run FMLA concurrently with Workers Compensation?

Not only can an employer run FMLA leave concurrently with a workers’ compensation absence, most often it is advisable that they do.

- If an employer fails to designate a WC leave of absence as FMLA leave, it may provide the employee with more leave than they would otherwise be entitled to.
 - For example, an employee is injured on the job and goes out and returns to work after three months, having received workers’ compensation benefits during the entire absence. Four months later, the same employee goes out on unrelated FMLA leave to care for an ill parent. If the original leave was not designated as FMLA leave the employee may be allowed time in excess of the 12 weeks of FMLA.
 - Once an employee uses up his or her 12 weeks of FMLA leave, the employee’s workers’ compensation benefit status does not provide them with job protection, although it is possible that the employee may be entitled to more time under the ADA if the injury qualifies



108



SUMMARY & TAKE AWAYS



109

SUMMARY AND TAKEAWAYS

- 1. *The majority of our employees use FMLA leave appropriately and for real medical needs.***
 - This should be our frame of reference when we are faced with an employee's request for medical leave or workplace accommodation. When you approach the situation with a level of sincerity rather than cynicism, you are more likely to be met with sincerity in return. To that end, let's not assume without any basis in fact that our employee is trying to misuse their leave of absence.



110

SUMMARY AND TAKEAWAYS

- 2. *Be empathetic. The words, "How Can I Help You?" can go a long way.***
 - This should be our frame of reference when we are faced with an employee's request for medical leave or workplace accommodation.
 - When you approach the situation with a level of sincerity rather than cynicism, you are more likely to be met with sincerity in return.
 - To that end, let's not assume without any basis in fact that our employee is trying to misuse their leave of absence.



111

SUMMARY AND TAKEAWAYS

- 3. *All Requests for Leave Should be Treated as a Request for a Reasonable Accommodation.***
 - Yes, you read that correctly. Each time an employee requests leave from the job because of a medical condition, the request should be analyzed through the lens of FMLA and ADA.
 - Where an employee needs leave from work because of a serious medical condition, any good employer should use it as an opportunity to engage in the interactive process to determine how we can best address the employee's situation in an effort to keep them engaged and at work.
 - A leave of absence is only one tool to help us accomplish our goal in maintaining a productive and healthy workforce.



112

SUMMARY AND TAKEAWAYS

- 4. Conduct a comprehensive audit of your FMLA policy, practices, procedures, and forms.**
- At a recent conference, the DOL noted that front-line managers often fail to recognize when an employee may need a leave of absence protected by the FMLA.
 - Even worse, some make derogatory comments about an employee's use of FMLA leave.
 - Many front-line managers simply are not properly trained to recognize when an employee has provided sufficient facts to trigger the FMLA and to take appropriate steps to respond to the employee's request.



113

SUMMARY AND TAKEAWAYS

- 5. Clean up your recordkeeping NOW.**
- Are you maintaining all the data DOL will be looking for, and are your data accurate?
 - Employers should have ready their employees' identifying information, their payroll data, date(s) of FMLA leaves, FMLA hours/days/weeks taken, copies of employer and employee FMLA notices, certification forms, benefit documents, and disputes about designation of FMLA leave.
 - These documents should be maintained for at least three years, and they should be kept separate from the personnel file.
 - In an investigation, the DOL will be making fairly broad information requests, so excellent recordkeeping is imperative..



114

SUMMARY AND TAKEAWAYS

- 6. Train managers and supervisors to help you achieve the kind of workplace you're trying to cultivate.**
- At a recent conference, the DOL noted that front-line managers often fail to recognize when an employee may need a leave of absence protected by the FMLA.
 - Even worse, some make derogatory comments about an employee's use of FMLA leave.
 - Many front-line managers simply are not properly trained to recognize when an employee has provided sufficient facts to trigger the FMLA and to take appropriate steps to respond to the employee's request.
- This is possibly the single biggest problem for employers, as it creates easy liability exposure.***



115

Disclaimer



DISCLAIMER: Please be advised that insurance coverage cannot be altered, bound, or cancelled by voicemail, email, facsimile, or online, and insurance coverage is not effective until confirmed in writing by a licensed agent. The materials contained herein do not establish a broker relationship with Poms & Associates Insurance Brokers and is provided for informational purposes only.

A representative of Poms & Associates Insurance Brokers can provide you with a personalized assessment. Please contact us at 818-449-9317.



116