

Family and Medical Leave Act

Overview & Updates
April 2011

CareWorksUSA

Disability Management Solutions

Costs of FMLA-Related Absences

- ❑ Large employers lose an average of ***\$760,000 every year in payroll costs due to unscheduled absences.***
- ❑ According to the Equal Employment Opportunity Commission (EEOC), employees who successfully sue for wrongful termination based on FMLA absence received an average of ***\$87,500 to \$450,000 in damages.***
- ❑ According to the Society for Human Resource Management, the ***average cost to defend an FMLA lawsuit is \$78,000, regardless of outcome.***
- ❑ According to the U.S. Department of Labor, managers and supervisors can be sued directly and held personally liable for paying damages (*Shultz v. Advocate Health & Hospitals Corp.; Narodetsky v. Cardone Industries, Inc.*)

Statistics by Commerce Clearing House (CCH) Unscheduled Absence Survey.

Family and Medical Leave Act

The Family Medical Leave Act of 1993, known as FMLA, is a federal law allowing eligible employees of a covered employer to take **job-protected leave**, for up to a total of 12 work weeks in any 12 months for any of the Qualifying Reasons:

- Pregnancy or Birth of a Child.
- Adoption & foster care.
- Care of a spouse, child, or parent with a serious health condition.
- Employee's own serious health condition.
- Care of a spouse, child, parent or next of kin with a serious injury or illness incurred within 5 years of active duty in the Armed Forces (up to 26 weeks).
- Qualifying exigency arising out of the fact that a spouse, child or parent is on active duty in the Armed Forces.

FMLA Covered Employer

825.104 Covered employer

- ❑ Who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.
- ❑ Public agencies are covered employers without regard to the number of employees employed. (counties, cities, towns)
- ❑ Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed.

FMLA Eligibility Requirements

- ❑ Employed by a covered employer with 50 employees in a 75 mile radius.
- ❑ Employed for 12 months. (does not have to be consecutive time; within last 7 year period)
- ❑ 1,250 actual hours worked preceding the date of the requested leave.
- ❑ Available FMLA hours.
- ❑ Qualifying condition certified by a health care provider or meeting military family leave entitlement.

FMLA 12 Month Period

Calendar Year Method

Each January 1 an eligible employee would be entitled to a full 12 weeks of FMLA leave, no matter how much FMLA leave the employee used the previous year or when it was used.

Fixed Year Method

Any fixed 12-month “leave year” such as a fiscal year, a year determined by a state statute, 12-months beginning on the employee’s “Anniversary” date – Under this method of calculation, an employee may take up to 12 weeks of FMLA leave at any time during the calendar year.

Rolling Forward

The 12-month period measured forward from the date any employee’s first FMLA leave begins – This 12 month period begins on the date of the individual employee’s first approved leave event. Ex: If an employee uses FMLA beginning April 1, 2006, their next 12-month period would run from April 1, 2007 thru March 31, 2008.

Rolling Backward

A “rolling” 12-month period measured backward from the date an employee uses FMLA leave – an eligible employee who had used the full 12 weeks of FMLA leave by Oct. 1st, would not be entitled to any additional FMLA leave until Oct. 1st of the following year.

FMLA – Military Leave Calculation

Leave to care for a covered servicemember with a serious injury or illness 825.127 C(1)

- ❑ Eligible employee is entitled to up to 26 weeks of leave during a single 12 month period.
- ❑ The ‘single 12-month period’ begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, **REGARDLESS OF THE METHOD USED BY THE EMPLOYER TO DETERMINE THE EMPLOYEE’S 12 WORKWEEKS OF LEAVE ENTITLEMENT FOR OTHER FMLA-QUALIFYING REASONS.**

FMLA as a Benefit

- ❑ FMLA statutes and regulations make it clear that FMLA is not intended to be an additional 12 week leave entitlement stacked on top of an employer's existing leave policies.
- ❑ If an employer knows the reason for the leave as FMLA qualifying, but does not designate it as FMLA, the employee is still afforded FMLA protections under the law (www.dol.gov/elaws/esa/fmla/faq.asp).
- ❑ *Neither the employee nor the employer can “waive” or “trade off” their rights under FMLA.*

FMLA as a Benefit

❑ **Substitution of Paid Leave 825.207**

Employer may require the employee to substitute accrued paid leave for unpaid FMLA leave

❑ **Run concurrently with other benefits**

(d) Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA.... In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement

(e) The Act provides that a serious health condition may result from injury to the employee “on or off” the job

Serious Health Condition

A medical condition that renders an employee unable to perform the essential functions of his or her job:

- Incapacity of more than three days with treatment.
- Hospital Care.
- Pregnancy.
- Chronic conditions requiring treatment.
- Permanent or long term conditions.
- Multiple treatments.

Who is Responsible for What?

- ❑ The **EMPLOYER** or the Employer's administrator is responsible for notifying the employee of FMLA benefits, designating time off work as FMLA and informing all employees of their rights under FMLA.
- ❑ The **EMPLOYEE** is responsible for notifying the employer of the need for leave AND providing medical certification by a health care provider, supporting the need for leave for benefits under FMLA.

Employee's Responsibilities

- ❑ Report the need for leave.
- ❑ An employee must provide 30 days advance notice for foreseeable FMLA, unless the leave is not foreseeable. In this case, notice must be provided as soon as practical.
- ❑ For FMLA - leave taken on an intermittent basis, must attempt to schedule leave so that employer's operations are not disrupted.
- ❑ Provide medical certification by their health care provider within on or before 15 days.

Employer Notice Requirements

825.300 Notice Requirements

(a) **General notice** - FMLA Poster & In employee handbook.

- Must be where employees/applicants can see it/large enough print to read.

(b) **ELIGIBILITY NOTIFICATION**

- Within 5 business days of employee notification.
- May be Oral or in Writing.
- Must indicate if employee is eligible for FMLA or not. If not, a specific reason must be included (not meeting 1250 hrs., lack of 12 mos employment etc.)
- (C) Include **Rights & Responsibilities Notification**.

(d) **DESIGNATION NOTIFICATION**

Certifications

825.305 Certifications

- ❑ Employer ‘may’ require – **MUST** give notice to the employee when a certification is required; **Require one for each condition/reason.**
- ❑ The employee must provide the requested certification to the employer within **15 calendar days** after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.
- ❑ Certification must be **“complete and sufficient.”**
- ❑ The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state **in writing** what additional information is necessary to make the certification complete and sufficient.

Certifications

825.305 Certifications

- ❑ Certification must be “**complete and sufficient**”

A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive.

- ❑ Provide the employee with **7 calendar days** (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with Sec. 825.313.

Certifications

825.305 Certifications

- ❑ (d) Consequences. At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification.
- ❑ If the employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure the certification or fails to provide any certification, the employer may deny the taking of FMLA leave.
- ❑ Includes...initial certification, a recertification, a second or third opinion, or a fitness for duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient.

Authenticity & Medical Clarification

825.307 Authentication

* Can perform Authentication on Initial & Re-certs.

Verifying Authenticity

- ❑ Contact the provider to verify authentic document (signature, faxed from provider).
- ❑ **“Authentication”** means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document.

Authenticity & Medical Clarification

825.307 Clarification of Medical

* Can perform Medical Clarification on Initial & Re-certifications.

Medical Clarification

- ❑ Can not be the employee's direct supervisor contacting the provider.
- ❑ **“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.

Re-Certification

When Can I require Recertification?

❑ **Every 6 months.** 825.308(b)...

“In all cases, **an employer may request a recertification of a medical condition every six months** in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.”

❑ **Exceeded Frequency & Duration.** 825.308(C)(2)...

“Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications)...”

Re-Certification

When Can I require Recertification?

❑ When in Doubt... 825.308(C)(2)...

“The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

“For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.”

In Loco Parentis – Definition

Administrator's Interpretation No. 2010-3 June 22, 2010

Issued by DEPUTY ADMINISTRATOR NANCY J. LEPPINK

Was....

- ❑ The FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for **AND** financially support a child. 29 C.F.R. § 825.122(c)(3). Employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave.

Is now...

- ❑ It is the Administrator's interpretation that the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child.

In Loco Parentis – Points to Remember

Administrator's Interpretation No. 2010-3 June 22, 2010
Issued by DEPUTY ADMINISTRATOR NANCY J. LEPPINK

- ❑ Either day-to-day care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child.
- ❑ There is no specific set of factors that, if present, will be considered to be dispositive in determining in loco parentis status.
- ❑ Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA.
- ❑ This Administrator's Interpretation does not address an employee's entitlement to take military FMLA leave for a son or daughter, which is determined by separate definitions. *See* 29 C.F.R. § 825.122(g), (h).

Covered Family Member – Documentation

Sec. 825.122

(j) Documenting relationships. For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

Documenting “In Loco Parentis”... A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship.

See 29 C.F.R. § 825.122(j); 73 Fed. Reg. 67,952 (Nov. 17, 2008) **Administrator’s Interpretation No. 2010-3**
June 22, 2010 Issued by DEPUTY ADMINISTRATOR NANCY J. LEPPINK

Thank You!

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