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Common FMLA Mistakes

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FMLA Overview

What is FMLA?

- Family & Medical Leave Act
- Federal law enforced by DOL
- Applicable to employers with 50+ employees
- Provides 12 (or 26) weeks of unpaid **job-protected** leave IF
 - Employee is eligible
 - For a covered reason
- Employee must be reinstated to same or equivalent position

Which employees qualify?

- FMLA:
 - Been employed for at least 12 months (does not need to be consecutive)
 - Has worked at least 1,250 hours during the 12 months prior to the leave request (consecutive)
 - Only actual work time counted
 - Leaves of absence, paid or unpaid, including FMLA leave, not counted
 - Worksite with 50 or more employees in a 75-mile radius

Under what circumstances may an employee take leave?

- Birth of a child
- Placement of a child for adoption or foster care
- **To care for a spouse, child, or parent with a serious health condition**
- **Because of the employee's own serious health condition**
- Military caregiver
- Military exigency

Types of Leave

- Single Block of Leave
- Intermittent Leave: Leave taken in separate blocks of time for a single illness or injury.
 - Can be for planned treatments
 - Or for conditions which “flair up” unexpectedly and prevent employee from doing his job (migraines, arthritis, lupus, bad back, etc.)
- Reduced leave schedule: Leave which results in regular alteration/reduction of scheduled work hours during the certified period.
 - Employee is entitled to be given a reduced leave schedule if condition qualifies
 - Does NOT apply to leave to care for a child—but employer may voluntarily designate such an arrangement
 - But employee cannot be forced to take off more time than he needs

Common FMLA Mistakes

#1 Failure to recognize FMLA is “in the picture”

- Employers often fail to recognize that absences may be covered by the FMLA
- Single or partial day absences may fall under FMLA
- Employees do not have to expressly ask for FMLA leave
- Absences related to work-related injuries may fall under FMLA
- Supervisory awareness is critical

General Categories of FMLA Serious Health Conditions

- Inpatient care
- Pregnancy-related conditions
- **Conditions resulting in more than three days of incapacitation**
- **Chronic health conditions**
- Treatment to prevent incapacitation or restorative surgery

Incapacity Plus Treatment

- Employee must be incapacitated for at least 3 consecutive, full calendar days *and either*:
 - Receive **two treatments by HCP**
 - Receive one treatment plus **regimen of continuing treatment**

Two Treatments by HCP

- Three days of incapacity, plus:
 - One treatment within first 7 days of incapacity;
 - AND
 - Two treatments within 30 days of first day of incapacity;
 - HCP decides whether and when 2nd treatment is warranted
- Treatment in this context means an in-person visit with HCP

FMLA Serious Health Conditions: Regimen of Continuing Treatment

- Three days of incapacity, plus both:
 - At least one treatment by HCP in first seven days of incapacity
 - Treatment in this context means in-person visit with HCP
 - Regimen of continuing treatment
 - Continuing treatment includes course of prescribed medication, therapy
 - Does not include over-the-counter meds, rest, fluids, exercise, etc. (even on doctor's orders)

Chronic Conditions

- At least two treatments by health care provider per year
 - Again, this means in-person visits
 - HCP decides whether and when treatment is warranted
- Need not visit HCP for every episode or flare-up
 - Self care allowed if HCP advises (*e.g.*, asthmatic told to stay home if pollen count is high)
- **No requirement of three days incapacity**

#2: Letting employees “run the show” on FMLA

- Employer (not employee) makes the decision as to whether an absence will be counted towards annual FMLA
- Employees may be required to give proper notice and cooperate in returning required paperwork
- You don’t have to let employees “decline” FMLA coverage for eligible absences
- Employees not permitted to use paid leave in lieu of FMLA, or “save” FMLA leave
- Paid leave and FMLA run may concurrently as long as you explain this in you written policy and notices

Timing of Employee Notice

- Foreseeable leave: 30 days notice or as soon as practicable
 - You may ask employee to explain why he didn't give 30 days' notice, delay leave if no good reason
- Unforeseeable leave: Must give as soon as practicable

Employee Notice : What Is Practicable?

- Time frames set by your usual notice procedures are generally considered “practicable”
- Unforeseeable leave: Usually practicable to give notice same or next day after learning of need for leave
 - Depends on circumstances, such as
 - Did an emergency trigger need for leave?
 - How incapacitated is EE?

Employee Notice: Employer's Policies

- You generally may require EEs to follow your usual notice procedures for other types of leave
- Your usual procedures can't contradict FMLA's.

Examples:

- Can require written notice
- Can't require more than 30 days notice

Employee Notice: Failure to Provide

- If EE doesn't follow notice procedures, you may delay or deny FMLA unless there are "unusual circumstances." Examples:
 - You specify number to call, no one there
 - You specify number, voice mail box is full
- EE must cooperate, answer questions on whether absence is FMLA-qualifying
 - If she doesn't, you may deny FMLA

#3 Paperwork snafus

- Employers should have a set of letters, notices, and forms handy
- Employers are often inconsistent in requiring employees to complete required FMLA paperwork
- Employers sometimes require **too much** or **too little** from employees and their doctors with respect to medical certification
- Employers often fail to follow up to make sure certifications are current

Certification of Serious Health Condition

- You can require certification for:
 - EE's serious health condition
 - Family member's serious health condition
- No certification for leave to care for healthy newborn/adopted/foster child
 - May require documentation of absences due to adoption/foster process
- Documentation of family relationships

Medical Certification: Timing of Employer's Request

- Employer must provide notice/request certification within 5 business days of: 1) receiving notice of need for leave; or 2) beginning of leave
 - See DOL Form WH-381 (as amended)
- Failure to provide notice may constitute FMLA interference
- Even with lack of proper notice, employer may retroactively designate leave as FMLA if:
 - It provides notice of such designation to employee and no harm will result; or
 - Employee agrees to retroactive designation

Medical Certification: Timing of Employee's Response

- Employee must provide certification within 15 calendar days
 - Extension possible if doing so was not practicable despite diligent efforts
 - If no valid reason for extension, employer may deny leave
- FMLA doesn't protect any leave taken without proper certification

Medical Certification: Rules for Contacting HCP

- Employer may seek clarification for incomplete or confusing FMLA paperwork
- Contact may be made:
 - Through another HCP; or
 - Directly by HR, FMLA administrator, management official (but not EE's direct supervisor)
- No inquiries allowed beyond scope of certification
- Challenges to the certification itself must come through recertification or second or third opinion process

Recertification

- Generally, you may request recertification every 30 days, only in connection with an absence
 - May request **before** 30 days have passed if:
 - Employees requests more leave
 - Significant change in circumstances
 - You learn info that causes you to doubt certification
 - May not request every 30 days if first certification says EE will be incapacitated **more than 30 days**
 - But recertification may in any event be requested every six months

Fitness-for-Duty Certification

- You may require one before allowing employee to return to work if:
 - Leave is for EE's own condition
 - You have uniformly applied policy that similarly situated EEs provide FFD certification
 - You provided proper notice of the requirement (in handbook or Designation Notice)
- At employee's expense

#4: Failure to Communicate

Intention to Return to Work

- May ask EEs to report periodically on their status and/or intent to return to work
 - But do not harass employee
- If EE expresses unequivocal intention not to return to work, your FMLA obligations are over
 - May not terminate early even if:
 - Employee says she thinks she won't be able to return at end of leave, and
 - It turns out that she actually couldn't have

Other communication issues

- Layoffs/restructuring/workplace changes
- Cause-based terminations

#5: Termination Mistakes

Attendance-based terminations

- Make sure that terminations are not even partly based on FMLA-covered absences
- Violation of the notice provisions of your attendance policy don't count

Quick trigger terminations

- An employee who has exhausted FMLA but still cannot come back to work may be under other legal protections
- ADA accommodation may be required

Slow boat terminations

- Employers sometimes allow leaves of absence to extend for months or years
- This presents a different kind of problem

FMLA Retaliation: Preventive Measures

- Watch the timing of any adverse actions against EEs seeking/taking FMLA leave
- Even if you allow leave, take care when basing adverse action only on factors predating EE's return to work because EE may argue a link to FMLA leave

FMLA Retaliation: Preventive Measures

- Give EEs plenty of notice and information about your policies, enforce them consistently, and document your actions well
- Do not base adverse employment decisions on FMLA leave – even in part
- Do not make negative remarks about FMLA use (including e-mails)

#6: Failure to Reinstate

Reinstatement Requirements:

General Rule

- Employee returning from leave must be reinstated to same or equivalent position as before taking leave
 - Compensation
 - Benefits and perks
 - Responsibilities
- Hardship on employer is NOT a defense

Reinstatement Exceptions

- EE can't perform essential job functions after FMLA leave ends
 - But ADA must be considered
- EE requests different job (i.e., different shift, schedule, or position)
- Term or project for which EE was hired has ended
- EE fails to provide fitness-for-duty certification

#7: Failure to Train Supervisors

#8: Confusing/incomplete written FMLA policy