

Managing FMLA Leaves: Twenty Years of Developments, Failures, and Lessons Learned

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**2013
Marked The
Twenty Year
Anniversary
Of The Family
And Medical
Leave Act**





DOL Releases FMLA Survey

- Employers generally find it easy to comply with the law.
- Misuse of the FMLA by workers is rare.
- 91% of employers report that complying with the FMLA has either no noticeable effect or a positive effect on business operations.



New FMLA Poster

EMPLOYEE RIGHTS AND RESPONSIBILITIES UNDER THE FAMILY AND MEDICAL LEAVE ACT

Effective March 8, 2013

Poster Highlights

- Definition of “veteran” includes those who serve and those discharged in the past 5 years (previously only those who were in current service)
- Explicit definition of “serious injury or illness” removed and replaced by a notice that there are differences between “serious injury or illness” for a service member and “serious health condition” for an employee or family member.

DOL Issues New Regulations on Military Leave and Airline Personnel

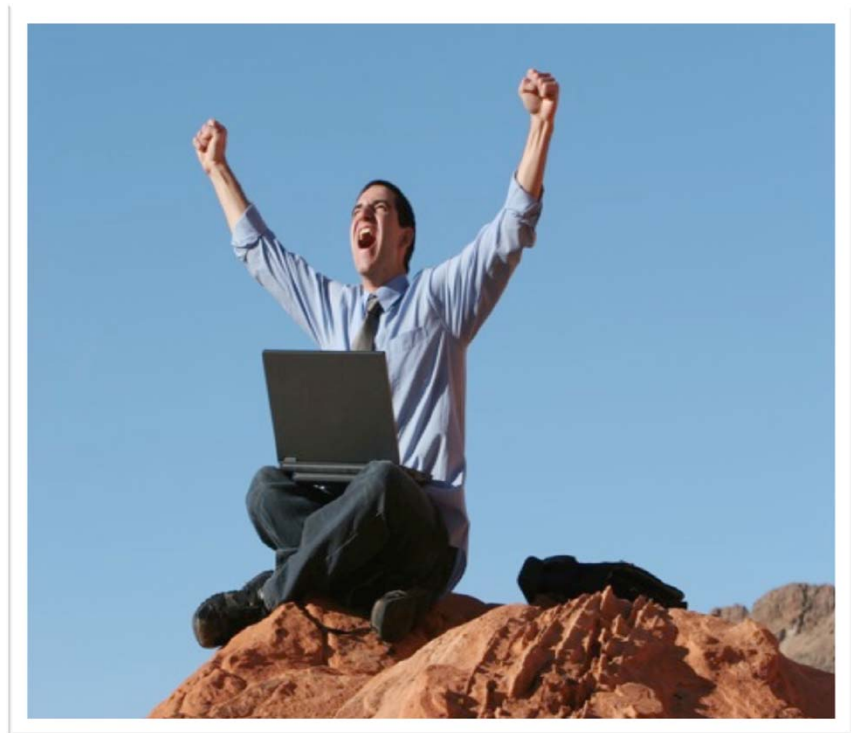
- Military caregiver leave was extended to cover veterans (those discharged or released under other than dishonorable discharge conditions five years before the employer's military caregiver leave begins).
- Medical certification can be from any healthcare provider not just military care providers

DOL Issues Final Regulations

- Qualifying exigency leave is extended to service members of the regular armed forces and not just National Guard and reserves.
- Eligible employees can now take 15 instead of just 5 days of qualifying exigency leave for a service member's rest and recuperation.
- Qualifying exigency leave now available for parental care leave made necessary by the covered active duty of a military member whose parent is incapable of self-care.

Any Chance Of Further FMLA Changes/Expansions?

Twenty Years of Developments, Failures, and Lessons Learned



Some FMLA Developments/ Failures/Lessons Learned



I. The ADA vs. The FMLA

- One of the most profound changes affecting how employers administer the FMLA arose with the 2008 Amendments to the ADA, i.e. the ADAAA.
- Today, the ADAAA acts almost as an umbrella or shadow over the FMLA.
- This can best be illustrated by three examples:

EXAMPLE A

An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one.

EXAMPLE A (continued)

Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.

EXAMPLE B

An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he is no longer is able to perform the essential functions of his position or an equivalent position.

EXAMPLE B (continued)

Under the FMLA, the employer could terminate his employment, but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

The ADA vs. The FMLA

Therefore, even when the FMLA leave is first requested by an employee, the employer needs to be thinking in terms of the ADAAA if the “serious health condition” could possibly be a “disability” under the ADAAA.

If so, the employer needs to:

- Engage in the interactive process
- Reasonable accommodation

EXAMPLE C

**Understand that the ADAAA may require
leave beyond FMLA leave**



Courts are basically in uniform agreement with the EEOC that under the ADAAA “the use of accrued paid leave or unpaid leave is a form of reasonable accommodation when necessitated by an employee’s disability.”

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02)

The General Rules

- An employer must engage in an interactive problem solving process with the employee to determine if reasonable accommodations are available that would allow the employee to fully perform the essential functions of the job.
- A reasonable accommodation (which may be additional unpaid leave) must be provided unless it causes an undue hardship for the employer.

***“Trucking Co. To Pay \$4.8M To End
EEOC Disability Bias Suit”***

November 12, 2012

The EEOC's suit claimed the Company violated the ADAAA by automatically terminating any employee who needed more than 12 weeks of leave, rather than determining whether it would be reasonable to provide additional leave as an accommodation for an employee's disability.

II. Always Provide Proper FMLA Notices



29 CFR § 825.302 Administration Procedure

- Issue Eligibility and Rights and Responsibilities Notice (WH-381) – within 5 business days after an employee requests FMLA leave or you have knowledge that an employee’s need for leave may be covered by the FMLA.
- Issue Medical Certification Form (WH-380E, for employee’s own serious health condition) – when you issue Eligibility Notice.

29 CFR § 825.302 Administration Procedure (continued)

- Employee returns completed certification form – within 15 calendar days after receipt.
- Advise employee in writing on Designation Notice if certification is incomplete or insufficient and state what additional information is necessary.
- Employee returns revised certification – within 7 calendar days.

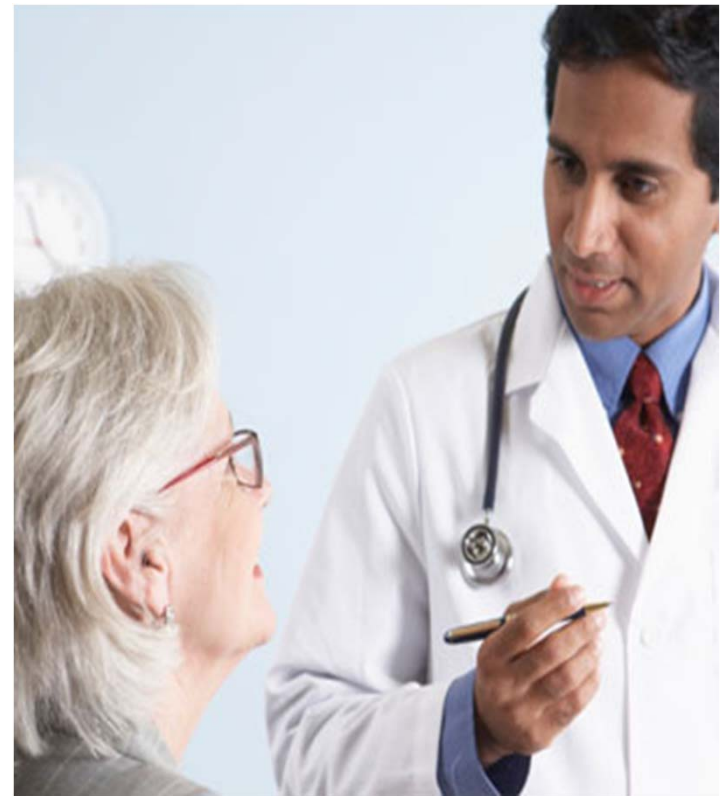
29 CFR § 825.302 Administration Procedure (continued)

- Issue Designation Notice (WH-382) – within 5 business days after receiving enough information to determine whether leave is covered by FMLA.

III. Always examine the medical certification form to determine if the employee's condition is REALLY covered by FMLA and, if so, for what specific periods of time.

Reviewing certification forms

- Is it complete?
- Is it vague, ambiguous or nonresponsive?
- Do the medical facts fit the definition of a condition covered by FMLA?
- Do you have reason to doubt the validity of the medical certification?
- What if the Employee fails to provide one?



Medical Certification

- If an employee fails to provide a medical certification, it can be an independent basis for denying FMLA leave.
 - *Kinds v. Ohio Bell Telephone Co.*, 724 F.3d 648 (6th Cir. 2013)
- Similarly, if the employee did not comply with the employer's request for a medical certification, the employer may treat the employee's absence as non-FMLA Leave.
 - *Poling v. Core MFG. Technologies*, 2012 WL 423762 (S. D. Ohio)

IV. 29 CFR § 825.312
Fitness for Duty Certification

An employer may seek a fitness for duty certification with regard to the particular health condition that caused the employee's need for FMLA leave if pursuant to a uniformly applied policy or practice.

Fitness for Duty Certification (continued)

- The certification from the employee's health care provider must certify that the employee is able to resume work.
- Additionally, an employer may require that the certification specifically address the employer's ability to perform the essential functions of the employee's job.

Fitness for Duty Certification (continued)

- An employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice, and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions.
- An employee who does not provide a fitness for duty certification or requests additional FMLA leave is no longer entitled to reinstatement *under the FMLA*.

Fitness for Duty Certification (continued)

- Unless the employee provides either a fitness for duty certification or new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. 29 CFR § 825.313(d).
- What about the ADA?

V. Recognize and Manage Intermittent Leave



Intermittent Leave

- Available for birth, adoption, foster care, and caring for newborn or newly placed child only if employer agrees.



Intermittent Leave Serious Health Conditions

- When “medically necessary” for employees with a serious health condition, a covered family member with a serious health condition, for military caregiver or qualifying exigency leave.
- Employees required to schedule treatment at times that do not unduly interrupt operations.
- Employees required to follow usual and customary notice procedures for requesting leave.

Some Things to Consider

- Consider recertification (may be requested after the duration in the certification or every six months), or when there are changed circumstances.
- Consider obtaining a second or third opinion on the need for intermittent leave.
- When the leave is for planned medical treatment, consider a temporary transfer to an alternative position with equivalent pay and benefits.
- Monitor and require new certifications when appropriate during your FMLA 12-month period. Then consider second and/or third opinions again.

**VI. An Employer May Condition FMLA –
Protected Leave on Compliance with
Its Usual Attendance Notice Policies
(29 CFR 825.302(d))**

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- An employer may require an employee to comply the employer's usual and customary notice and procedural requirements for requesting leave (absent unusual circumstances).
 - Employer can enforce its notice policies even if the requirements go beyond the bare minimum that would generally be sufficient under the FMLA to constitute proper notice.

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- An employee may be required by an employer's policy to contact a specific individual.
 - Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA protected leave may be delayed or denied.

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- Therefore, to take advantage of this regulation Employers must have a policy governing absences, leave, etc. that is applied in a non-discriminatory manner.

VII. Application Of The FMLA To Same Sex Marriage

In the wake of the Supreme Court declaring part of the Defense of Marriage Act (DOMA) unconstitutional, the DOL published guidance to clarify that under the FMLA, same-sex spouse employees maybe eligible for leave to care for a seriously ill spouse or for activities related to a spouse's military deployment

Application Of The FMLA To Same Sex Marriage

(continued)

- This guidance does not modify current FMLA regulations that recognize that a spouse is determined under the laws of the state in which the employee resides.

Application Of The FMLA To Same Sex Marriage

(continued)

- DOL fact sheet #28F confirms that lawfully same-sex couples who live in a state that recognizes same-sex marriage will be entitled to up to 12-weeks of FMLA leave to care for a seriously ill spouse or for activities that arise in connection with a military spouse's deployment; and up to 26 weeks of caregiver leave for a military spouse who is seriously injured or ill, if they are eligible for FMLA leave

Application Of The FMLA To Same Sex Marriage

(continued)

- Employers would not be required to make FMLA Leave available to a same-sex spouse who resides in a state that has its own DOMA law and does not recognize same-sex marriage.

**VIII. CONTINUE TO READ, REVIEW AND
UNDERSTAND THE FMLA
REGULATIONS**





**Somebody
has to read
them!**

The Family and Medical Leave Act and Regulations are some of the most complex areas that we as Human Resource Managers and Employment Attorneys work with.

With regard to this minefield, it is important to continue to read and review the regulations, attend training such as this, and keep abreast of recent developments.

You Can Have More Successes Than Failures In FMLA Administration

BEST PRACTICES

- Consider that a request for FMLA leave can also be a request for reasonable accommodation under the ADAAA.
- Develop a system for reaching out to employees nearing the end of FMLA leave to inquire about status and intent to return to work.
- At the end of FMLA leave consider whether there is a request for additional leave implicating the ADAAA.

BEST PRACTICES (continued)

- If so, consider reasonable accommodation and undue hardship issues.
- Always provide proper FMLA notices and understand the use of each DOL form.
- Have a uniform and non-discriminatory policy concerning the fitness for duty certification and require one.

BEST PRACTICES (continued)

- Understand both the employer's and employee's obligations and rights concerning the issuing of medical certification and its return by the employee.
- Learn how to manage (as best as possible) intermittent leave.
- Revise your FMLA Policy in your employee handbook both for legal compliance and attendance and notice policies, fitness for duty policies, etc.

BEST PRACTICES (continued)

- If you have not done so, read, review and understand the FMLA regulations.
- Train managers and supervisors to recognize and report potential FMLA covered absences.
- Train managers and supervisors on the retaliation/interference obligations of the FMLA.
- Train managers and supervisors of the interplay between the FMLA and the ADAAA.



FMILA:
*The Fridays and
Mondays Leave Act*