

Employment Compliance: An Eagle's Eye View

FMLA Hit List

Presented by:

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#1: Controlling Intermittent Leave



Helpful Hints

- **FAMILY MEDICAL INTERMITTENT LEAVE LOG**
- Employee Name: _____
- Date: _____
- Human Resources Employee Completing Log: _____
- Date Certification Received: _____
- Reason for Intermittent Leave: _____
- Date the 12 month period began: _____
- Total (in hours) of FMLA intermittent leave time available to employee: _____ hrs. (480 for employee who works a 40 hour work week with no overtime)

Intermittent Leave for Salaried and Exempt Employees

Date of Absence	Reason Stated for Absence	Time Absent (documented in time no shorter than 15 minute increments)	Amount of leave time remaining	Employee's signature
EX:	Migraine Headache	4 hours	476 hours	

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- Employee must make “reasonable effort” to schedule intermittent leave
 - Employer has honest belief defense available
 - Do you think employee misrepresented need for leave?
 - What evidence do you have of this?
 - Honest Suspicion does not = Accurate Determination

Intermittent Leave for Salaried and Exempt Employees

#2: Dealing with Doctors

When is it ok to
contact?



What Can I Ask and When Can I Ask It?

- When requesting medical certification
 - At time employee gives notice or
 - Within 5 business days
- Assertion of Inadequate Certification
 - If certification is insufficient or incomplete
 - Employer must
 - State in writing what additional information is needed
 - Allow employee "reasonable opportunity" to cure
- Stick to topics covered in medical certification form



What about Second Opinion?

- If employer has reason to doubt the validity of an employee's FMLA certification, the employer may require a second opinion.
- Employer must pay for the second opinion

#3: When to Start FMLA Leave



#4: Retroactively Applying FMLA Leave

- "Finally, a Win for Employers!"



New Rule:

- Previously, FMLA regulations required employers who failed properly to designate employee leave as FMLA leave to offer an additional 12 weeks of FMLA leave.
- Under the *new* regulations, however, only when an employee's failure to comply with FMLA notice requirements causes an employee **individualized harm** may the employer be liable for damages. 29 C.F.R. § 825.300(e).

Example 1: Employee Breast Cancer

- An employer is put on notice that an employee needs FMLA leave but fails properly to designate the leave.
- The employee's own serious health condition prevents her from returning to work during that time period.
- The employee may **not** be able to show **individualized** harm as the result of the employer's actions.

Example 2 : Employee's child at St. Jude

- Same situation as before, except this time, the employee takes leave to provide care for a child with a serious health condition.
- The employee believes that the leave will **not** count toward his FMLA entitlement and plans to use FMLA leave to provide care for his spouse, who will need assistance when she is recovering from a surgery she is soon to have.
- The employee **may** be able to show **individualized** harm as the result of the employer's failure properly to designate—the employee might establish, for instance, that he would have arranged for an alternative caregiver for his child if the leave had been designated timely.

#5: Waiver of FMLA Claims and Severance Agreements



Employee Checklist: What to Do When An Employer Offers An Employee a Severance Agreement:

The employee must understand the agreement.

- The employee should read the agreement to see if it is clear and specific, or if it is confusing because it contains terms the employee does not understand.
- If the employee is 40 or older, he/she should inform his/her employer that the law requires the agreement to be written in a manner that makes it easy to understand. Usually this means that the agreement should not contain technical jargon or long, complex sentences.

Check for deadlines and act promptly

- The moment an employee is given a severance agreement, he/she should check to see if his/her employer has given a deadline for accepting, or declining, the agreement. If an employee is 40 years old or older, federal law requires the employer to give the employee at least 21 days to review the agreement and make up his/her mind.
- If an employer has not given the employee a reasonable amount of time, or rushes the employee's decision, this is a red flag. An employer who is far well understood that the employee cannot review or make decisions about an important document on a moment's notice.
- If an employee is being rushed, he/she should ask for more time. If a request is refused, if an employee is 40 or older and the employer is asking for a decision in fewer than 21 days, the employee should remind the employer that the law requires an employee to be provided at least 21 days. If at least two employees are being laid off in a reduction in force (RIF) at the same time, the employee must be given 45 days to consider the agreement.

Consider having an attorney review the severance agreement

- Even if an employee is parting amicably with the employer, the employee may want to ask for advice about whether he/she should sign it, whether the terms are reasonable, and whether he/she should ask his/her employer to change any of the terms.
- If an employee decides that he/she wants an attorney to review the agreement, he/she should promptly make an appointment. The employee should not wait until the last day before the deadline to review the severance agreement.
- If an employee is at least 40 years old, the agreement must advise his/her to consult with an attorney.

The employee must understand what he/she is giving up in exchange for severance pay or benefits

- The main benefit to signing an agreement is that the employee will receive a cash payment or benefits in exchange for signing away his/her rights to bring certain legal claims against his/her employer.

#6: Honoring FMLA Rights

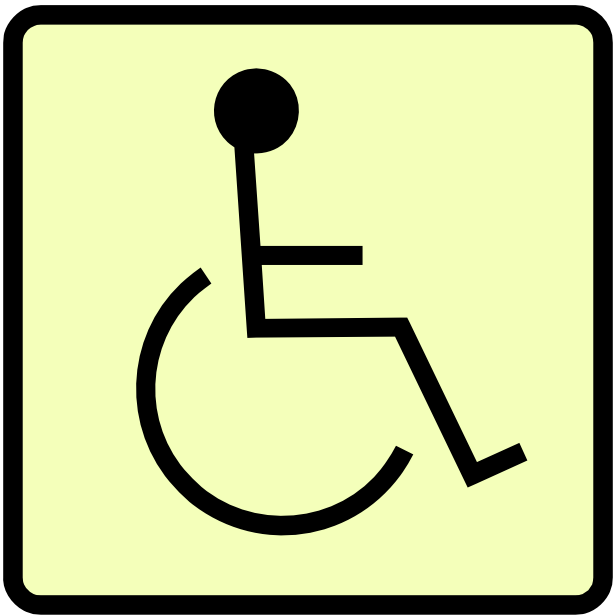
- i.

Mr. _____ acknowledges that he has received all of the leave from work for family and/or personal medical reasons and/or other benefits to which he believes he is entitled under Company's policy and FMLA.
- ii.

Mr. _____ has no pending requests for FMLA leave.
- iii.

Company has not mistreated Mr. _____ in any way because of any illness or injury to Mr. _____ or any member of his family.

#6: FMLA and ADA



#7: Termination and Discipline

- Employees Already on Leave
- Employees Who Take Leave to Avoid Discipline/Termination

The image is a screenshot of a 'Disciplinary Warning Notice' form. The form is titled 'Disciplinary Warning Notice' in a blue header bar. Below the header, there are several sections: 'Personal Details' with fields for Employee Name, Position, Date of disciplinary hearing, and Date of disciplinary hearing; 'Details of disciplinary hearing' with a text area for the notice; 'History of Disciplinary Warnings' with a table showing previous warnings; and 'Employee's comments' with a text area for the employee's response. The form is presented as a stack of three identical forms, with the top one being the most prominent. The form is blue and white, with a clean, professional layout.

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- Employees Already on Leave
 - Employees Who Take Leave to Avoid Termination/Discipline

#8: FMLA and GINA

- **Genetic Information Nondiscrimination Act of 2008, Effective May 21, 2009**
- **Applies to:**
 - **Employees**
 - **Insurance companies**
 - **Group health plans**
- **Generally prohibits the receipt and use of genetic information for insurance underwriting or employment purposes.**