

FMLA Developments and Common Employer FMLA Mistakes

Recent FMLA Developments, Top 5 FMLA Mistakes,
and Suggested Best Practices

Ellen Donovan McCann/October 2018

Top 5 FMLA employer mistakes

The following mistakes allow FMLA abuse and can create liability for employers who are not administering FMLA requests appropriately



Top 5 mistakes

- 1 Improperly determining eligibility
- 2 “Deeming” employees FMLA eligible
- 3 Failure to provide required notices
- 4 Failure to calculate leave entitlement appropriately
- 5 Improper use of recertifications

1 Improperly determining eligibility



Regulations

(825.104; 825.105;
825.110; 825.111)

Employee must:

- Work for covered employer
- Have worked 1,250 hours and 12 months
- Work at a worksite where there are 50 employees in a 75-mile radius



1 Improperly determining eligibility (continued)



Best practice
(825.104; 825.105;
825.110; 825.111)



CAUTION: Include temp time in hours worked and tenure for any employee who worked for you as a temp.

Make sure you are a covered employer. Verify that you had 50+ employees for each *working day* for 20 weeks in the current or preceding year

At the time the leave is requested, determine that the employee works at a location where there are 50 employees within 75 miles

- Count all employees on payroll (including temps) except expatriates
- For work at home employees, look to site in to which employee reports or receives assignments from

Verify that the employee worked for 12 nonconsecutive months prior to start of leave

- Include employment prior to a continuous break in service of 7 years or less
- Include military service in calculation of tenure and hours worked

Verify that the employee worked 1,250 hours immediately prior to the start of leave using FLSA “hours worked” standard.

- Do not include leaves or PTO

2 “Deeming” employees eligible for FMLA



Regulations

(825.110(d);
825.120(a)(2);
825.121(a)(2);
825.207(c);
825.301;
825.701(a)(3))

An employer cannot “deem” an employee eligible for FMLA if they are not eligible. An employer cannot deem an absence to be FMLA-covered if it is not



Best practice

(825.104; 825.105;
825.110; 825.111)

Do not count FMLA absences against an employee unless the employee is eligible and the absence is covered

- If you improperly deduct time from an employee’s FMLA bank, the employee may be entitled to an additional 12 or 26 weeks of FMLA leave
- Do not treat office locations as covered if there are not 50 employees within a 75-mile radius
- Grant a corporate leave if you wish to provide leave in circumstances that are not covered by FMLA (i.e., domestic partners, grandparents, small offices, new employees)

3 Failure to provide required notices



Regulations (825.300)

Employers have to give four notices:

General notice

- General rights under the FMLA

Eligibility notice

- Send within five days of request for leave
- State at least one reason why if ineligible
- Once eligible, employee remains eligible for remainder of the leave year for that leave reason (although may exhaust entitlement)

Rights & Responsibilities notice

- Provide at the same time as eligibility notice
- Advise of method used for 12-month period
- Use of paid leave & conditions
- Must explain that if employee wants, can go unpaid

Designation notice

- Within five business days of determining that leave qualifies as FMLA, send notice as to exactly how much time is designated
- If not possible to determine time, provide every 30 days on request of employee if leave was taken within 30-day period
- Must inform about fit-for-duty requirements and essential job functions if those are to be addressed in fit for duty
- Failure to designate – employer is liable only if employee can demonstrate harm



3 Failure to provide required notices (continued)



Best practice

- Electronic general notice is sufficient but it must be accessible to employees and applicants

- If you have a handbook, general notice must be in the handbook

- If no handbook, must distribute upon hire

4 Failure to calculate leave entitlement appropriately



Regulations

(825.205(h))

Holidays within a full week of FMLA are counted as FMLA

- If an employee is using FMLA leave in increments of less than one week, the holiday will not count as FMLA unless the employee was otherwise scheduled to work during the holiday
- If employer's business activity has temporarily ceased for one or more weeks, the days the employer's activities ceased do not count as FMLA



Regulations

(825.205(b))

The actual workweek is the basis of leave entitlement to determine how much FMLA leave time an employee is entitled to take

- For example, a 40 hour/week employee is entitled to twelve 40-hour weeks of FMLA or 480 hours of FMLA
- A 30-hour/week employee is entitled to 360 hours of FMLA



4 Failure to calculate leave entitlement appropriately (continued)



Regulations

(825.200(b))

If an employee's schedule varies from week to week so that an employer is unable to determine with certainty how many hours the employee would have worked (but for the taking of FMLA leave):

- A weekly average of the hours scheduled over the 12 months prior to the beginning of the leave (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement



Regulations

(825.205(c))

If an employee would normally be required to work overtime but is unable to do so because of an FMLA-qualifying reason:

- The hours which the employee would have been required to work may be counted against the employee's FMLA entitlement but must also be factored into the employee's entitlement



4 Failure to calculate leave entitlement appropriately (continued)



Best practice

- Take care to appropriately determine an employee's FMLA bank, factoring in the employee's normal schedule and any required overtime
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- Review an employee's FMLA usage to determine if a holiday falls within a full week of FMLA

5 Improper use of recertification



Regulations (825.308)

Recertification cannot be requested more often than every 30 days unless:

- an extension is requested,
- an employer has reason to doubt the validity of the leave request,
- the circumstances of the leave have changed, or
- the minimum duration has expired.



Best practice

Regardless of the minimum duration of the condition, recertification can be requested every six months.



The DOL clarified that this applies even to “unknown and indefinite” conditions.

- Recertify at a minimum of every 6 months
- Recertify patterns of absence (i.e., Monday/Friday)
- Recertify absences that exceed stated frequency and duration
- Recertify if you receive information that questions validity
- Utilize clinical resources to determine whether/when to recertify unknown or indefinite conditions

Recent FMLA Developments

FMLA Enforcement Trends

- 2012 to 2015: 192% increase in FMLA court filings.¹
- 2017: DOL handled 1,165 FMLA complaints. 50% of these found violations
- Nature of each complaint investigated by the DOL:
 - 225: Refusal to grant FMLA leave
 - 122: Refusal to restore to an equivalent position
 - 493: Termination
 - 11: Failure to maintain health benefits
 - 314: FMLA discrimination matters
- 2017: DOL secured \$1,481,952 in back wages as a result of FMLA violations.²

¹Bloomberg BNA, October 24, 2016 report

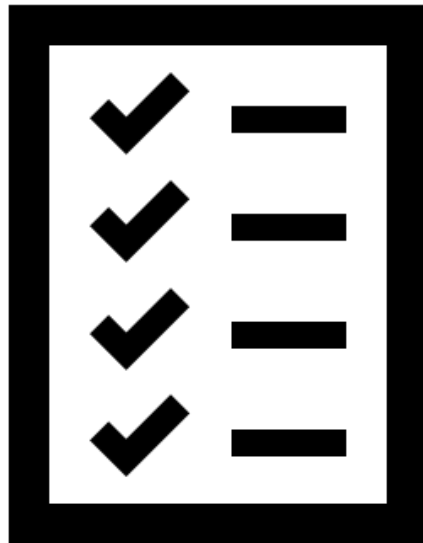
²DOL FMLA Enforcement Statistics. 2017 Statistics by Administrative Office of the U.S. Courts, <https://www.dol.gov/whd/data/datatables.htm#panel5>

**Opinion
Letters
are back!**



***Letters, We Get Letters, We Get
Stacks and Stacks of Letters . . .***

- **June 2017:** DOL announced it would begin issuing opinion letters to assist employers.
- 2 FMLA Opinion Letters issued and 1 FLSA Opinion Letter that impacts FMLA.
 - *Compensability of FMLA “breaks”*
 - *Is organ donation a SHC?*
 - *No fault attendance policies and FMLA*



- New FMLA model notices and medical certification forms released
- Previous forms expired on 6/1/18
- No substantive changes
- Expiration date changed to 8/31/2021
- All employers should be using the new forms
- <https://www.dol.gov/whd/fmla/forms.htm>

U.S. Department of Labor
Wage and Hour Division



OMB Control Number: 1235-0003
Expires: 8/31/2021

Temporal Proximity

- Courts keep saying it's not enough but....
 - *Degner v. Juneau County (W.D. Wis. 3/5/18)*
 - Employer argued that performance issues discovered during FMLA leave were “final straw” that led to termination after leave
 - Years of inaction on performance issues and solid reviews undermined employer’s argument and created triable issues
 - *Valle v. Frank Martz Coach Company (M.D. Pa. 11/16/17)*
 - *Fred Walpool v. Frymaster, LLC (W.D. La 11/16/17)*
 - *Woods, v. START Treatment & Recovery Centers, Inc. (2nd Cir., 7/19/17)*

***Boadi v.
Center
for Human
Dvpmnt.***
(D. Mass. Sept. 2017)

- Grace hospitalized due to sudden mental health issues
- Son reported hospitalization, HR sent FMLA paperwork
- Supervisor to son: can't call on mom's behalf, don't call again
- Drafted termination letter for NC/NS; another supervisor signed letter
- Grace released from hospital, certification supporting leave for 1 mo., but terminated a short time later after submitting certification
- Jury:
 - Grace entitled to leave, son gave notice, no good basis for termination
 - Lost wages and liquidated damages over \$284,000

Stewart v. Wells Fargo

(N.D. Ala. Mar. 2017)

- Debby: interacted with clients, sales quota
- Clients complaining, met 11% of sales quota
- Debby requests leave after being warned about performance
- Debby returns: more client complaints, poor sales numbers, and not trying anymore
- Boss in an email: Outlines performance issues, states termination “justified because ‘Debby submits a request for medical leave’”

Takeaways:

- FMLA 101
- How does Debby compare with other employees?

***Wink v.
Miller
Compressing
Co.***
(7th Cir. 2017)

- Tracy approved to work from home 2 days/wk. to care for autistic son; time not worked = FMLA leave
- Employer changed “work-at-home” policy; Tracey to report next day
- Tracy: could not find care for her special needs child this quickly; reported to work, but left early to care for son
- Tracey terminated; HR: your FMLA only covered treatment and therapy
- Jury award: \$120,000k+ (back pay and liquidated damages)

Perry v. Isle of Wight County

(E.D. Va. Aug. 2017)

- Lisa injured herself at work, fractured shoulder
- Out of work through July 31; extended to August 4, but Lisa did not inform employer of extension
- Policy:
 - Failure to report to work after leave ends results in resignation
 - But: call-in policy allowed employees up to 4 days to report absence
- Court: Lisa entitled to reinstatement since she followed call-in policy
- \$747,000+ for back pay, benefits, liq. damages, front pay

Jackson v. BNSF Railway Co.

(N.D.
Tex., Aug. 2017)

- Michelle: overwhelmed by the volume of work
- Put on PIP, took FMLA leave shortly thereafter and remained out of work with no estimated return date
- While on leave, Michelle attended a Beyoncé concert . . . in the employer's luxury suite
- Manager: please report to work to explain yourself
- Michele did not respond, terminated
- Court: Honest suspicion of abuse, Michele refused to cooperate, FMLA claims dismissed

Walker v. City of Pocatello

(D. ID, Jan. 2018)

- John Walker was a police officer who had previously overseen an investigation involving his new boss, the Chief
- Walker took FMLA shortly after his new boss was promoted
- The Chief ordered surveillance on Walker
- Walker sued
- Court: Genuine issue as to whether invasive surveillance of Walker's private activities would "chill" his use of FMLA, and whether they were negative consequences of Walker taking FMLA leave.

***EEOC v.
Estee
Lauder (E.D.
PA 2017)***

- Estee Lauder provided paid parental leave to its employees
- Moms were presumed to be primary caregivers entitled to 6 weeks of bonding leave
- If dad claimed to be primary caregiver, he had to show proof
- EEOC-disparate benefits based on gender is a violation of Title VII
- Settled for \$1.1M
- EEOC Pregnancy Discrimination Guidance https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IC3

FMLA Class Actions

Class or Collective?

Carrel v. MedPro Group, Inc. (N.D. Ind.
4/26/17)

Butler v. Ill. Bell Tel. Co. (N.D. Ill. 2/14/08)

Loy v. Motorola, Inc. (N.D. Ill. 11/23/04)

Andrews v. CSX Transportation (U.S.D.C. FL
8/2/10)

Questions?
