

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

Presented by:

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**February 4, 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

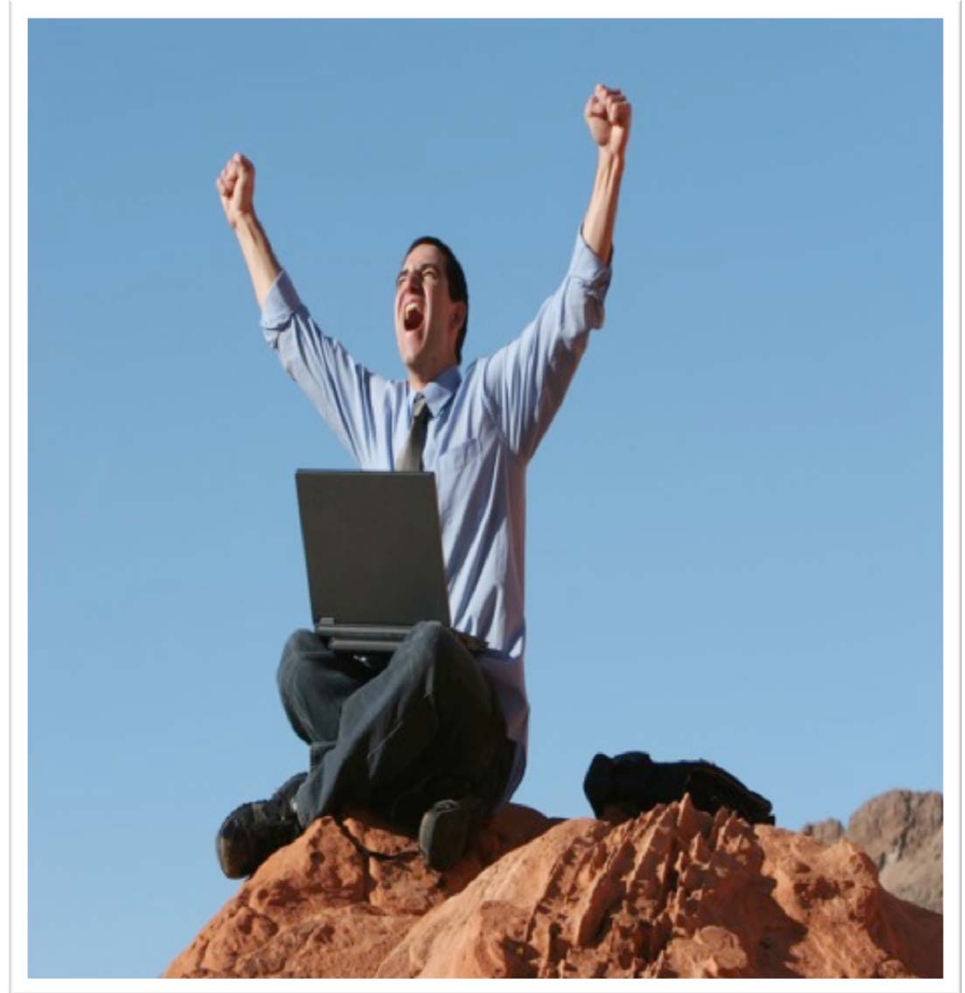
- Effective March 8, 2013, military caregiver leave will be extended to cover veterans (those discharged or released under other than dishonorable discharge conditions five years before the employer's military caregiver leave begins).
- Medical certification can be from any healthcare provider not just 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 Successes, Failures, and Lessons Learned



Five Favorite FMLA Failures



1. Failing to realize the ADAAA may require leave beyond FMLA leave



Related Issue: Failing to consider reasonable accommodations and requiring employees to be 100% fit before they can return to the job.

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.

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- The EEOC further alleged that the company violated federal law by refusing to make exceptions to a “no restrictions” policy that did not allow employees to return to work with any medical restrictions.

THE EEOC COMMENTED . . .

“This settlement demonstrates the need for employers to have attendance policies which take into account the need for paid or unpaid leave as a reasonable accommodation for employees with disabilities,” Nancy Sienko, the field director for the EEOC's Denver office, said in a statement.

Lessons Learned

- Develop a system for reaching out to employees nearing the end of FMLA leave to inquire about status and intent to return to work.
- If additional leave is requested beyond FMLA, consider first any available leave under state law and then company policy.
- If additional leave is still needed, consider reasonable accommodation issues.
- **The toughest issue:** Is holding the job required when leave is granted as a reasonable accommodation?

FMLA FITNESS FOR DUTY

- **FMLA:** Employer may require fitness for duty certification only if pursuant to a uniformly applied policy or practice. A best practice to include in the employee handbook.
- **FMLA:** Must provide advance notice if doctor must certify the ability to perform specific essential functions. Must check appropriate statement on the Designation Notice and provide job description.

2. Failing to Provide FMLA Notices



- Eligibility notice and rights and responsibilities.
- Designation of leave.

FMLA Administration

- Employee need not mention FMLA. Management must determine if FMLA applies to a full or partial day absence.
- Employer provides eligibility notice. (WH-381).
- Employer provides certification form, if applicable.
- Employer provides designation notice (WH-382).

Lessons Learned

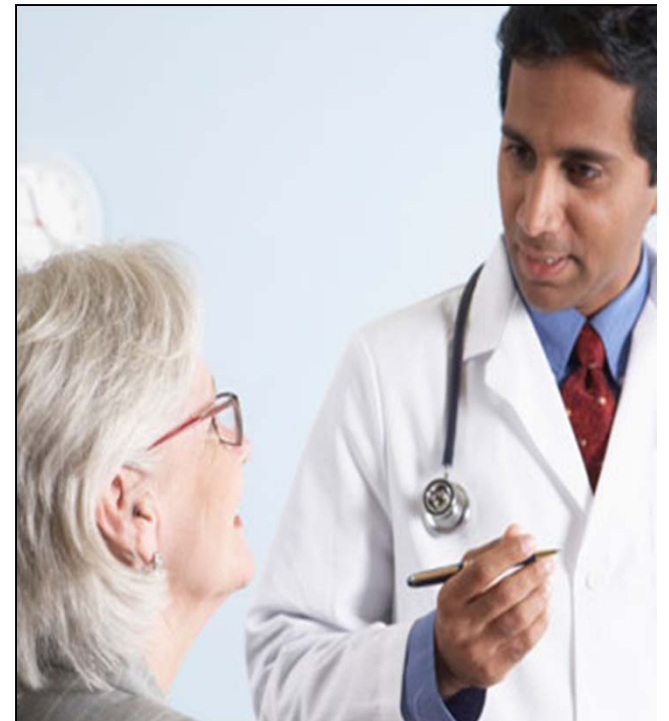


- Designate someone in HR/Benefits to administer FMLA leave.
- Train HR, FMLA Administrator and Management
- Consider use of a third party administrator.
- Develop a flow chart, checklist, or protocol for FMLA administration factoring in overlap with Company leave policies, absence reporting policies, state leave laws, workers' compensation, STD, LTD, and ADAAA.

3. Failing to 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?



4. Failing to 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.
- Must address in handbook policy.



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.

Lessons Learned

- 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.
- 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.



**Somebody
has to read!**

**For example, let's take a
look at the concept of
in loco parentis . . .**

Interpretation of *In Loco Parentis* for An Employee Taking Leave to Care For A Child

- June 22, 2010 – DOL issues Administrator’s Interpretation No. 2010-3
- 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.

Interpretation of *In Loco Parentis* for An Employee Taking Leave to Care For A Child

- It should be noted that the fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding that the child is the “son or daughter” of an employee who lacks a biological or legal relationship with the child for purposes of taking FMLA leave. Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA.

Interpretation of *In Loco Parentis* for An Employee Taking Leave to Care For A Child

- Such situations may, or may not, ultimately lead to a legal relationship with the child (adoption or legal ward), but no such relationship is required to find *in loco parentis* status.
- *in loco parentis* may include same sex domestic partnerships.

From: Cindy Lou Who [clwho@abc.com]

Sent: Monday, March 18, 2013 4:24

PM

To: Vance, M. Kim

Subject: Parentis In Loco--making me loco!

Definition of “Child” when over 18

- January 14, 2013 – DOL issues Administrator’s Interpretation No. 2013-1
- A child 18 years of age or older must have a mental or physical disability and be incapable of self-care because of that disability to be a “child” under FMLA.
- This Interpretation clarifies that the age of the child at the onset of a disability is not relevant in determining a parent’s entitlement to FMLA leave.

Definition of “Child” when over 18

- A parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter:
 - (1) has a disability as defined by the ADA;
 - (2) is incapable of self-care due to that disability;
 - (3) has a serious health condition; **and**
 - (4) is in need of care by the parent (your employee) due to the serious health condition

Adult Children

- “Incapable of self-care” means “the individual requires active assistance or supervision to provide daily self-care in three or more of the ‘activities of daily living’ (ADLs).” 29 C.F.R. § 825.122(c)(1).
- ADLs include caring appropriately for one’s grooming and hygiene, bathing, dressing, eating, cooking, cleaning, shopping, taking public transportation, etc.



**Somebody
has to read!**

Can You Have More Successes Than Failures In FMLA Administration?

FMLA Action Plan

- Designate a person(s) in HR/Benefits to administer FMLA and train that person or use a third party administrator.
- Develop a flow chart or checklist for FMLA administration working in other laws and policies.
- Update/Revise your employee handbook for compliance and to take advantage of all available opportunities to streamline administration and enforcement.

FMLA Action Plan

- Customize and simplify FMLA forms. (Keep in mind the legal requirements for content of the forms)
- Develop draft letters to use for various situations such as a reminder letter when an employee fails to timely return a medical certification or when a medical certification is incomplete.

FMLA Action Plan

- 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 on the interplay between FMLA, ADA, and workers compensation.

FMILA:
*The Fridays and
Mondays Leave Act*

What Questions Do You Have

