

## AFTER 20 YEARS, FMLA STILL CREATES CONFUSION AND FRUSTRATION FOR EMPLOYERS

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This year marks the 20<sup>th</sup> anniversary since President Clinton signed into law the Family Medical Leave Act (FMLA). While the law is hailed by some as the most widespread positive initiative to help employees balance work and personal responsibilities, for employers it continues to create scheduling conflicts and a wide array of questions as to exactly who is covered and for what reasons.

Over the years, the Department of Labor (DOL) has continued to refine and update the FMLA in an effort to extend the benefits to more people, to better explain when leave is available, and how it is to be implemented. Literally hundreds of pages of updates and amendments have been released since 1993, creating a challenge for HR professionals trying to follow the most current guidelines. Likewise, in the past few years, the DOL has made several modifications that significantly increase the number of employees who qualify for leave under FMLA. For example, leave is now provided in certain circumstances for employees who have family members in the military. In addition, the EEOC adopted an expanded definition of what constitutes a “disability” under the terms of the Americans with Disabilities Act (ADA), which consequently has impacted the FMLA by extending coverage to employees needing to care for adult children who meet specific requirements. Statistics as to the number of employees actually taking FMLA leave vary greatly, depending on the source of the survey. Pro-labor organizations argue that the incidence of FMLA leave is low since it is an unpaid absence. While that may be

true in very general terms, some industries are hit harder than others. Those employing a larger percentage of young workers who are starting families, for example, typically struggle more than the average employer in adhering to the guidelines because the greater the number of employees on leave at any one time, the more likely it is that the absences will interfere with productivity and, ultimately, profitability.

One of the greatest challenges of the FMLA continues to be in managing intermittent leave since it occurs on an ongoing basis, often times with little to no notice provided. With the expanding definitions from the DOL as to what is covered by FMLA, conditions such as migraines, arthritis and even strep throat can create major problems—not only because they are persistent and unscheduled, but because they are subject to abuse by the employee.

Another challenge for employers is in the area of tracking leave time, because it is not always possible to predict when a situation or condition could elevate into a more serious problem that meets the criteria of a covered condition. Since employers need to provide written notice to employees alerting them that their time off is being counted as FMLA time, it is critical to understand exactly when a condition meets the FMLA criteria.



When you consider the DOL’s continuing efforts to expand FMLA guidelines and definitions, the amount of paperwork that is required to document employee leave requests, and the attention to detail that is required to track accumulating leave time, it is little wonder that some larger employers need to hire someone who is dedicated to overseeing FMLA procedures and communications. Some companies are even utilizing a third-party administrator to handle their FMLA leave, similar to how third parties are often utilized to administer workers’ compensation claims.

*Continued on Next Page*



**Given the intricacies of today's FMLA environment, what should employers keep top-of-mind relative to FMLA?**

- Create and update formal company policies relative to FMLA leave requests and protocols; make sure these policies are properly and frequently communicated to all employees.
- Train supervisors on FMLA definitions and procedures so they understand how and when an FMLA request can be triggered. This training is important for all supervisors – not just those who administer FMLA for the employer - to be able to recognize when FMLA may be implicated.
- Understand the rights and obligations of the employer when an employee requests leave (this is especially important when intermittent leave is requested, as the questions and guidelines become more involved in these cases).
- Clearly define and communicate the deadlines and leave time to employees requesting leave and to those who are ultimately granted FMLA leave.

- Understand what restraints are in place when bringing the employee back from FMLA leave. Under the FMLA, employees are assured they can return to an “equivalent” position. Assuming a business need is documented, however, there may be justification for changing shifts, etc. The FMLA is designed to protect employees from being “punished” by being assigned a “worse” job or position.
- Consult an attorney who specializes in employment matters before making any changes to your company’s FMLA policies or before denying any potentially controversial leave requests.

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